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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

PUERTO RICO AQUEDUCT AND
SEWER AUTHORITY,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether, in using without notice or an explanation of reasons the summary judgment standard of Rule 56 of the Federal Rules of Civil Procedure as the burden of proof for granting an evidentiary hearing, the Environmental Protection Agency impermissibly departed from the explicit legal standard articulated in its regulations.

II. Whether such a departure by an administrative agency, permitted and rationalized by the First Circuit, should be enforced judicially when comparable attempted departures have been set aside and have not warranted such deference by this Court and the Courts of Appeals for the First, Fourth, Fifth and District of Columbia Circuits.

III. Whether the First Circuit's failure to identify and accord any deference to the Congressionally recognized scientific expertise of the United States Geological Survey, which conducted the only empirical study on the effects of the Mayaguez outfall and made findings of scientific fact that supported the Puerto Rico Aqueduct and Sewer Authority's request for an evidentiary hearing, was contrary to this Court's long-standing admonition to accord such deference.

IV. Whether the First Circuit's affirmation of the Environmental Protection Agency's denial of the Puerto Rico Aqueduct and Sewer Authority's evidentiary hearing request, based on its alleged failure to present evidence sufficient to meet regulations that Environmental Protection Agency has conceded are scientifically imprecise and speculative in their requirements, was contrary to this Court's admonition in Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609 (1973).

PARTIES TO THE PROCEEDING

The petitioner is the Puerto Rico Aqueduct and Sewer Authority ("PRASA"), petitioner in the court below. The respondent is the United States Environmental Protection Agency ("EPA"), respondent in the court below.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Puerto Rico Aqueduct and Sewer Authority ("PRASA") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on August 31, 1994.

OPINIONS BELOW

The decision of the court of appeals (App. A1) is reported at 35 F.3d 600 (1st Cir. 1994). The Order Denying Review of the Environmental Appeals Board (App. A33) is reported at NPDES Appeal No. 92-23, 1993 TSCA LEXIS 240 (August 23, 1993). The Order Denying Reconsideration and Stay Pending Review of the Environmental Appeals Board (App. A26) is unreported.

JURISDICTION OF THE SUPREME COURT

The judgment of the court of appeals was entered on August 31, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. The Federal Water Pollution Control Act ("Clean Water Act), 33 U.S.C. §§ 1251-1387, is produced in relevant part below:

> **§ 1251. Congressional declaration of goals and policy.**
>
> **(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective**
>
> The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters....
>
> * * *
>
> **(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States**
>
> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use ... of land and water resources ....

33 U.S.C. § 1251 (1988).

2. 33 U.S.C. § 1311(h)(2) ("Section 301(h)(2)") of the Clean Water Act is produced in relevant part below:

> (2) the discharge . . . will not interfere, alone or in combination with pollutants from other sources, with the attainment or maintenance of that water quality which assures protection of public water supplies and the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife . . .

33 U.S.C. § 1311(h)(2) (1988).

3. The relevant provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 704-706, are set forth below:

> All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of --
>
> (A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record . . . .

5 U.S.C. § 557(c) (1988).

> The reviewing court shall --
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be --
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity; . . .
>
> (D) without observance of procedure required by law;

(E) unsupported by substantial evidence . . . .

5 U.S.C. § 706 (1988).

4. Relevant portions of the regulations governing the request for and grant of evidentiary hearings on permit decisions arising under 33 U.S.C. § 1311(h), at 40 C.F.R. §§ 124.74-.75 are set forth below:

§ 124.74. Requests for Evidentiary Hearing.

(a) Within 30 days following the service of notice of the Regional Administrator's final permit decision under § 124.15, any interested person may submit a request to the Regional Administrator under paragraph (b) of this section for an evidentiary hearing to reconsider or contest that decision . . . .

(b)(1) In accordance with § 124.76, such requests shall state each legal or factual question alleged to be at issue, and their relevance to the permit decision, together with a designation of the specific factual areas to be adjudicated and the hearing time estimated to be necessary for adjudication. . . .

40 C.F.R. § 124.74 (1994).

§ 124.75. Decision on request for a hearing.

(a)(1) Within 30 days following the expiration of the time allowed by § 124.74 for submitting an evidentiary hearing request, the Regional Administrator shall decide the extent to which, if at all, the request shall be granted, provided that the request conforms to the requirements of § 124.74, and sets forth material issues of fact relevant to the issuance of the permit.

40 C.F.R. § 124.75 (1994).

5. Relevant portions of the regulation governing the award of a modification and waiver of permit requirements mandated by 33 U.S.C. § 1311(h)(2) are set forth below:

> **§ 125.61. Attainment or maintenance of water quality which assures protection of public water supplies, the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife, and allows recreational activities.**
>
> * * *
>
> (f) *Stressed waters*. If an applicant believes that its failure to meet the requirements of paragraphs (a) through (e) of this section is attributable to conditions resulting from human perturbations other than its modified discharge (including, without limitation, other municipal or industrial discharges, nonpoint source runoff and the applicant's previous discharges), the applicant must demonstrate, to the satisfaction of the Administrator, that its modified discharge does not or will not:
>
> (1) Contribute to, increase, or perpetuate such stressed conditions;
>
> (2) Contribute to further degradation of the biota or water quality if the level of human perturbation from other sources increases; and
>
> (3) Retard the recovery of the biota or water quality if the level of human perturbation from other sources decreases.

40 C.F.R. § 125.61 (1994).

STATEMENT OF THE CASE

The United States Court of Appeals for the First Circuit in this case affirmed an Order of the Environmental Protection

Agency's ("EPA") Environmental Appeals Board ("the Board") which denied review (App. A33) of EPA Region II's ("Region II" or "EPA Region II") denial of the Puerto Rico Aqueduct and Sewer Authority's ("PRASA") request for an evidentiary hearing concerning a material factual issue about the effect of PRASA's wastewater treatment plant's discharge into Mayaguez Bay in Mayaguez, Puerto Rico. The First Circuit affirmed based on the Board's finding that, although PRASA had raised a "material" issue (App. A49), PRASA had failed to raise "a genuine issue of material fact," as that phrase has been articulated through the summary judgment standard and jurisprudence from Rule 56 of the Federal Rules of Civil Procedure. (App. A16.) The Board imposed this evidentiary standard on PRASA, even though it departs from the "material issues of fact relevant to the issuance of the permit" standard plainly and explicitly set forth by the EPA regulation governing such evidentiary hearing requests, 40 C.F.R. § 124.75(a)(1) (1994), and used in EPA's precedents without an interpretive reference to Rule 56 or to its jurisprudence. The Board did so with no explanation other than its assertion that "this requirement [in 40 C.F.R. § 124.75(a)(1)] is very similar to the requirement set forth in Rule 56." (App. A48.)

Moreover, in applying this new evidentiary standard to PRASA's request for an evidentiary hearing, the Board accorded no deference to the formal scientific findings and conclusions presented in the only empirically based report on the effect of the Mayaguez discharge undertaken by any administrative agency. This report, prepared by the United States Geological Survey ("the USGS") (App. A62), provided substantive support for PRASA's request. The First Circuit declined to acknowledge and to accord any deference to the report's formal scientific findings and conclusions, despite the USGS's long history and Congressionally-recognized expertise with such water related matters, *see, e.g.*, 43 U.S.C. § 31 (1988), especially in Puerto Rico, 30 C.F.R. § 401 (1993). Finally, the First Circuit affirmed the Board's denial of an evidentiary

hearing based on its finding that PRASA had failed to present "any evidence" (App. A21) to meet EPA regulations which EPA itself has acknowledged are scientifically imprecise and "so difficult that EPA is unable to provide specific guidance or suggested analytical procedures" for meeting them. 44 Fed. Reg. 34784, 34806 (1979).

PRASA is the agency of the Commonwealth of Puerto Rico which oversees all of the Island's drinking water and wastewater treatment and processing facilities. PRASA operates a publicly owned treatment works at Mayaguez ("Mayaguez POTW"), a small city on the western shore of Puerto Rico. The Mayaguez POTW subjects wastewater to primary treatment. In 1979, PRASA began the process of obtaining a modified permit, for a waiver of secondary treatment requirements, for the Mayaguez POTW pursuant to Section 301(h) of the Clean Water Act, 33 U.S.C. § 1311(h) ("Section 301(h)"). A Section 301(h) waiver would eliminate the need to design and construct a new secondary treatment facility that would have cost approximately $25 million at the time. PRASA filed its Section 301(h) waiver application with EPA Region II. At approximately the same time, PRASA began constructing a pipeline outfall that would channel the primary wastewater through a pipeline along the ocean floor into the Mayaguez Bay, where it would be discharged through the outfall into an area of the Bay known as the Bahía de Añasco. PRASA began its construction with EPA's conditional approval, in large part, in reliance on Congress' explicit recognition – especially for Puerto Rico – that such a pipeline outfall could warrant a Section 301(h) modification of secondary treatment requirements. *See* S. Rep. No. 370, 95th Cong., 1st Sess. 44-46 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4369-71. The pipeline outfall was completed in 1987.

The permit modification application and application revision process continued until 1991, when EPA Region II denied the application. EPA Region II, and later the Board in August -

1993, denied PRASA's request for an evidentiary hearing on facts which supported its receipt of a modified permit under Section 301(h). These facts were raised by PRASA in its hearing request (App. A73; A82) and were supported and confirmed by the USGS in its report prepared *after* the outfall began operating in 1987. (App. A62.)

EPA's regulations on evidentiary hearings, 40 C.F.R. Parts 124 and 125, do not contain or refer to the summary judgment standard of the Federal Rules of Civil Procedure, or even to the words of that Rule. This case represented the first and only occasion on which the Board had applied explicitly the summary judgment standard of Rule 56 to decide whether an applicant's case merited an evidentiary hearing. The Board provided no notice that it was going to apply the new legal standard, nor did it provide an explanation of the legal reasons for the new standard. The Board did not even allow PRASA to resubmit its evidentiary hearing request in light of the new standard.

The Board also failed even to acknowledge USGS's scientific findings and formal conclusions that the outfall did not harm the surrounding marine environment and that the USGS report provided the facts and methodology for a predictive analysis about future effects as a means for meeting EPA's acknowledged scientifically imprecise regulations. EPA has neither undertaken an empirical study of its own that examined the outfall's actual effects on the Bay nor has it provided PRASA with a methodology for predictive analysis about future effects.

The First Circuit endorsed the Board's actions regarding its application of the Rule 56 summary judgment standard, despite the standard's absence in the plain language of 40 C.F.R. § 124.75 and the court of appeals' acknowledgement that the Board had never before articulated the standard's use. (App. A19.) It speculated that EPA must have "necessarily contemplated" such a standard (App. A9) and that, in any event,

"we refuse to attach talismanic significance to the absence of the stock phrase 'genuine issue of material fact,'" in the EPA regulation. (App. A10.) The Court also refused to explain the meaning of EPA's precise use of the "stock phrase" from Rule 56 in other evidentiary standards not applicable to Section 301(h) hearing requests. *See, e.g.*, 40 C.F.R. § 124.84 (1994); 40 C.F.R. § 164.91 (1993); 40 C.F.R. § 209.25 (1993).

The First Circuit's opinion provided a rationale for the Board's actions, with regard to imposition of the summary judgment standard, findings of fact, and application of those facts to the regulatory requirements for a Section 301(h) modification. (App. A9; A19.) In doing so, the First Circuit contradicted not only its own prior decisions, but also the decisions of this Court and other courts of appeals. Moreover, the First Circuit exceeded its judicial role by substituting its own reasoning for the Board's departure from the well-established, plainly stated standard, although the Board had offered none. (App. A16.) The First Circuit also failed to fulfill its judicial role by ignoring significant scientific findings presented by the USGS as well as the PRASA-USGS effort to divine and define a methodology for predictive analysis where EPA had failed deliberately to provide one.

A. Statutory Scheme

Passed in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a) (1988), the Federal Water Pollution Control Act Amendments of 1972, popularly known as the Clean Water Act ("the Act"), prohibit "the discharge of any pollutant . . . by any person," *id.*, into marine waters of the United States unless a discharger meets certain discharge requirements. 33 U.S.C. § 1311 (1988).

Under Section 301(b) of the Act, 33 U.S.C. § 1311(b), EPA has established effluent discharge standards or limitations for

particular pollutants, consistent with effluent controls that are achieved by dischargers, based on water quality standards or practical and feasible pollution control technology. 33 U.S.C. § 1311(b) (1988). Accordingly, the Act requires sources that discharge directly into navigable waters to obtain National Pollution Discharge Elimination System ("NPDES") permits. 33 U.S.C. § 1342 (1988).

EPA or a state agency may issue an NPDES permit for the discharge of any pollutant by a POTW, such as the Mayaguez facility operated by PRASA.[1/] To receive an NPDES permit, the applicant must meet discharge requirements set forth in Sections 301, 302, 306-08, and 403 of the Act, as well as any other reasonable conditions EPA deems necessary to satisfy the Act. 33 U.S.C. § 1342(a)(1) (1987).

Section 301(b) requires all POTWs to meet secondary treatment standards in their NPDES permits, unless a discharger can demonstrate that it qualifies for a modification of these standards under Section 301(h), 33 U.S.C. § 1311(h). Section 301(h) sets forth nine criteria a discharger must meet to obtain a Section 301(h) NPDES permit modification. The criterion at issue in this proceeding, Section 301(h)(2), requires:

> (2) the discharge . . . will not interfere, alone or in combination with pollutants from other sources, with the attainment or maintenance of that water quality which assures protection of public water supplies and the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife . . .

33 U.S.C. § 1311(h)(2) (1988).

[1/] A state may choose to implement the NPDES Permit Program; however, the Commonwealth of Puerto Rico has chosen not to do so. EPA Region II issues the NPDES permits for discharges in Puerto Rico.

Congress enacted Section 301(h) in 1977 to relax the strict requirements of the Clean Water Act in environments where the rapid dilution and strong currents of ocean waters and deep marine discharge would disperse concentrated pollutants and render them harmless to the marine environment. *Natural Resources Defense Council, Inc. v. EPA*, 656 F.2d 768, 773-74 (D.C. Cir. 1981). Congress specifically identified the shores off the Commonwealth of Puerto Rico as appropriate geographic and oceanographic settings for Section 301(h) waivers. S. Rep. No. 370, 95th Cong., 1st Sess. 44-46 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4369-71.

In 1979, EPA promulgated additional requirements based on Section 301(h)(2), including those circumstances in which an effluent would discharge into "stressed waters," *i.e.*, waters already "stressed" by manmade sources other than the effluent. 44 Fed. Reg. 34784, 34806 (1979); *see* 40 C.F.R. § 125.61 (1994). Section 125.61(f) essentially requires a permit applicant to demonstrate that its discharge does not now, nor will it ever, "contribute to, increase, or perpetuate such stressed conditions." 40 C.F.R. § 125.61(f) (1994). The outfall's overall effects on the marine environment, not the volume of sediment discharged, is the determinative factor in whether an applicant meets the criteria for a Section 301(h) permit modification. 33 U.S.C. §§ 1311(h)(1)-(9); 40 C.F.R. § 125.61(f). EPA warned that "[a]s a practical matter, it will be extremely difficult for most applicants discharging into stressed waters to demonstrate that their discharge will meet the requirements of section 125.61." 44 Fed. Reg. at 34806. EPA specifically noted that Section 125.61(f)(3), "which requires a predictive analysis of biological responses to future pollution, is so difficult that EPA is unable to provide specific guidance or suggested analytical procedures for making this determination." *Id.*

If the EPA Region denies an application for a Section 301(h) permit modification, EPA regulations permit the applicant to request an evidentiary hearing on the denial. 40 C.F.R.

§§ 124.74-.75 (1994). The relevant portion of the regulations provides that "the Regional Administrator shall decide the extent to which, if at all, the request shall be granted, provided that the request conforms to the requirements of § 124.74, and sets forth material issues of fact relevant to the issuance of the permit." 40 C.F.R. § 124.75(a)(1) (1994).

B. Facts of the Case and Proceedings Below

Puerto Rico began construction of the Mayaguez POTW in 1979, with the approval of EPA. Construction of the outfall also was undertaken with EPA's approval. The outfall began discharging into the Bay in 1987, under an NPDES permit issued while PRASA's application for a Section 301(h) permit modification was pending. The outfall discharges approximately 1,719 meters from shore, at a depth of approximately 33 meters. Prior to the outfall's operation, EPA's theoretical modeling techniques estimated its annual discharge at approximately 850 tons of sediment, approximately 1.3 percent of the total annual sediment from all pollution sources into the Bay. The hills surrounding Mayaguez Bay have been the site of local agriculture for approximately three hundred years. The runoff from this farming and the Río Grande de Añasco, contribute the remaining 98.7 percent of sediment into the Bahía de Añasco, the portion of the Bay adjacent to the Mayaguez outfall. PRASA now operates under the interim requirements of the 1987 NPDES permit.

PRASA originally submitted its Section 301(h) application for Mayaguez in September 1979, and EPA Region II issued its final denial of PRASA's Section 301(h) application on December 13, 1991. The EPA Region II denial found, *inter alia*, that PRASA had failed to address the issue of stressed waters, as required by Section 301(h)(2).

On February 26, 1992, PRASA requested that EPA Region II grant an evidentiary hearing, pursuant to 40 C.F.R.

§§ 124.74-.75, to contest the factual and legal bases for EPA Region II's denial. With its hearing request, PRASA submitted a 1992 report prepared by the USGS. (App. A62.) The USGS Report, which represents the first and only empirical examination of the outfall's effects since the plant began operating in 1987, studied eight sites in Mayaguez Bay, and, using those samples, concluded that during three years of operation, the Mayaguez outfall had not affected adversely the coral and related biota surrounding the outfall, thereby satisfying an element of Section 301(h)(2) and EPA's regulatory requirements. The USGS Report also found that subsequent to the initiation of the outfall's operation, some of the marine species actually had recovered from damage caused by earlier natural events unrelated to the outfall. The USGS's scientific findings, especially those findings concerning effects unrelated to the outfall, and the methodology used to attain them, suggested an analytical means for examining future effects from all sources of contaminants. Based on this Report and other studies, PRASA so informed Region II in its request for an evidentiary hearing, especially with respect to meeting the requirements of 40 C.F.R. §§ 125.61(f)(1) and (f)(3). (App. A73; A82.) The USGS Report consisted of the Report's factual findings and conclusions, a major primary study and, as appendices to the Report, several subordinate studies "submitted to the USGS" but not representing "the official position of the U. S. Government." (App. A62.)

On July 23, 1992, the EPA Region II Administrator denied PRASA's evidentiary hearing request. (App. A44.) Although by its own admission it had undertaken only a "cursory" review of the USGS Report, Region II concluded that PRASA had failed to present any evidence that it met the stressed waters showings of 40 C.F.R. § 125.61(f), particularly (f)(1) and (f)(3). As a result of its "cursory" review, Region II relied almost exclusively on pre-1987, theoretical studies of the outfall's effects.

Region II found that because PRASA had failed to raise "material issues of fact relevant to the issuance of the permit" -- the explicit standard in 40 C.F.R. § 124.75 for an evidentiary hearing -- it was denying PRASA's evidentiary hearing request. PRASA appealed Region II's finding to the Board on August 25, 1992.

PRASA's appeal to the Board challenged the factual and legal conclusions made by Region II, especially its failure to recognize and defer to the USGS's official conclusions. On August 23, 1993, the Board issued its Order Denying Review ("Order"). (App. A33.) The Board's Order began by articulating the explicit, applicable legal standard which governed the grant of an evidentiary hearing request contained in 40 C.F.R. § 124.75(a)(1). (App. A47.) The Board found that PRASA *had* presented a "material issue of fact" regarding its compliance with Section 301(h)(2) and 40 C.F.R. § 125.61(f). (App. A49.) Nonetheless, the Board found this showing insufficient. (App. A55.) The Board explained that it now construed 40 C.F.R. §§ 124.74(a) and 124.75(b)(1) as requiring PRASA to "ensure that there is a genuine issue of material fact," as that phrase has been articulated through the summary judgment standard and jurisprudence from Rule 56 of the Federal Rules of Civil Procedure. (App. A48; A50.) The Board did not explain why it was adopting this standard and its jurisprudence, in this context, at this time, or what practical or legal effects its actions would have on PRASA.

The Board made certain findings of fact drawn from the USGS Report, with regard to PRASA's alleged failure to show that the Mayaguez outfall does not and will not contribute to, increase, or perpetuate stressed conditions under Section 125.61(f). (App. A56.) The Board failed to acknowledge the USGS Report's formal conclusion, which found not only that the outfall was not implicated in any coral degradation, but that the outfall did not have adverse effects on

the biota in the Bahía de Añasco. (App. A65.) Those conclusions stated:

> . . . *data collected during this study does not implicate the outfall as a stressor*. Balanced indigenous populations were documented in the soft-bottom communities at 8 sites in the bay, including a site in the initial mixing zone of the outfall. Significantly, the growth rate at the star coral *Montastrea annularis*, located only 610 meters from the south leg of the diffuser, has not decreased since the outfall became operational. Instead, the community has shown a continuous recovery from a bleaching event that affected the region in 1987-88 . . . .
>
> * * *
>
> *The outfall is not implicated in this degradation, as seen in that the corals growing near the outfall were stressed in 1987 and have since recovered while the outfall has been operational. Sedimentation deposition patterns continue to reflect the dominance of the Rio Grande de Añasco in determining the future environment and biota for the Bahia de Añasco. Water quality sampling verify that the outfall is effectively dispersing contaminants in the effluent within the prescribed mixing zone.*

(App. A66; A72 (emphasis added).)

Rather than recognizing the USGS Report's formal conclusion, the Board chose to focus on one subordinate study in Appendix 3 of the USGS Report, which had made inconclusive findings regarding the outfall's effects on the coral reefs, and whose author, Dr. Carlos Goenaga, actually co-authored and approved the formal, final USGS conclusions. This subordinate study provided the scientific basis for the Board's decision, measured against its new, Rule 56 Summary Judgment standard.

After the Board issued its Order, PRASA moved the Board for Reconsideration and a Stay Pending Reconsideration on September 7, 1993, which the Board also denied on December 17, 1993. (App. A26.) PRASA filed a Petition for Review with the United States Court of Appeals for the First Circuit.

The First Circuit denied PRASA's Petition in an Opinion issued August 31, 1994. (App. A1.) The First Circuit justified the Board's adoption of the Rule 56 summary judgment standard with the rationale that the "material issues of fact" standard established by 40 C.F.R. § 124.75 "necessarily contemplate[s]" application of Rule 56's "genuineness" standard for the purposes of granting an evidentiary hearing. (App. A9.) The Court did not discuss the "plain meaning" rule or the correlative fact that EPA has used deliberately the "genuine issue of material fact" standard in other regulatory settings. The First Circuit also stated that three previous NPDES decisions by the Board had used the word "genuine," although it conceded that the Board had never before "in *haec verba*" articulated the application of Rule 56 or its jurisprudence in any of those decisions. (App. A19.) In its rationale for the Board's actions, the First Circuit characterized the procedures for obtaining an evidentiary hearing as "an adjudicatory framework that included an administrative summary judgment procedure . . ." and recounted in detail the general history of administrative summary judgment proceedings and analogies to the Federal Rules of Civil Procedure in administrative settings. (App. A9-10.)

In sum, the First Circuit excused the Board's failure to give notice of the new summary judgment standard for 40 C.F.R. § 124.75, despite its recognition that EPA's choice of words in 40 C.F.R. § 124.75 has no legal significance, its acknowledgement that the Rule 56 standard had never before been articulated explicitly, and its disregard for the Board's failure to offer any formal notice or a meaningful explanation of its reasons for the change.

The First Circuit also adopted the Board's finding that PRASA had failed to present any evidence regarding the "future impacts" requirement of 40 C.F.R. § 125.61(f)(3), analogizing the case to this Court's decision in *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 621 (1973). (App. A20.) In doing so, the First Circuit did not discuss the findings and formal conclusions of the USGS Report, the scientific imprecision and absence of scientific guidance in Section 125.61(f)(3), or PRASA's effort to suggest that the Report's methodology and facts could provide an analytical means for future prediction.

REASONS FOR GRANTING THE WRIT

1. In Allowing The Use Of The Summary Judgment Standard Of Rule 56 Of The Federal Rules Of Civil Procedure As The Burden Of Proof For Granting An Evidentiary Hearing, The First Circuit Has Permitted The EPA To Depart Without Proper Notice Or Any Explanation Of Its Legal Reasons From The Evidentiary Standard Explicitly Articulated In Its Regulation And Used In Its Precedents For Many Years, Acting Contrary To The Decisions Of This Court, And The Decisions Of The Courts Of Appeals For The First, Fourth, Fifth And District Of Columbia Circuits.

For over fifteen years, EPA has maintained a legal standard for evidentiary hearing requests on Section 301(h) decisions which requires the presentation of "material issues of fact relevant to the issuance of the permit." 40 C.F.R. § 124.75(a)(1) (1994). This standard has been in place since 1978, when EPA abandoned the previous standard for granting such a hearing, which required a demonstration of "genuine and substantial issues of fact relevant to the questions of whether a permit should be issued, denied or modified." 41 Fed. Reg. 52308, 52311 (1976); *see* 43 Fed. Reg. 37078, 37120 (1978).

Even at that time, EPA did not characterize its then more stringent standard as a "summary judgment" procedure or the equivalent of Rule 56 of the Federal Rules of Civil Procedure, despite the apparent similarity in the words used. EPA stated that it was abandoning this previous standard and eliminating the words "genuine and substantial" because "the existing regulations governing adjudicatory hearings provide inadequate assistance or direction to presiding officers or to the parties." 43 Fed. Reg. at 37078. EPA has not changed the words in the legal standard since that time. It certainly knows how to do so.[2/]

The First Circuit ignored the principle that the meaning of a regulation first must be sought in the language in which it is framed. 2A Norman J. Singer, *Sutherland, Statutory Construction* § 46.01 (5th ed. 1992); *see also Caminetti v. United States*, 242 U.S. 470, 485-86 (1917); *United States v. Behnezhad*, 907 F.2d 896, 898 (9th Cir. 1990). The plain language of the regulation demonstrates that EPA used the words "material issues of fact," not the words "genuine issue of material fact," to describe the burden for obtaining an evidentiary hearing. 40 C.F.R. § 124.75(a)(1). The maxim of *expresio unius est exclusio alterius* mandates that all omissions from a regulation should be understood as an intentional exclusion by the drafter. *Russello v. United States*, 464 U.S. 16, 23 (1983); *Navarro-Ayala v. Hernandez-Colon*, 951 F.2d 1325, 1340-1343 (1st Cir. 1991); *Natural Resources Defense Council, Inc. v. EPA*, 822 F.2d 104, 131 (D.C. Cir. 1987). EPA has had ample opportunity to include the Rule 56 summary

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[2/] EPA regulations do contain a procedure, identified as "summary determination," which uses the term "genuine issue of material fact." 40 C.F.R. § 124.84 (1994). EPA also has used deliberately these same terms in other regulations. *See, e.g.*, Noise Control Act, 40 C.F.R. § 209.25 (1993) ("No genuine issue of material fact exists and a party is entitled to judgment as a matter of law"); Federal Insecticide, Fungicide and Rodencide Act, 40 C.F.R. § 164.91 (1993).

judgment standard in its regulations. The First Circuit should have recognized the significance of EPA's decision not to do so, especially where, as here, EPA *has* done so in other regulations.

Moreover, in many years of decisionmaking, EPA's precedents have applied the "material issues of fact" standard of Section 124.75(a)(1). *See In re City & County of San Francisco*, NPDES Appeal No. 91-18, 1993 TSCA LEXIS 41, *63 (March 24, 1993); *In re City of Jacksonville, District II Wastewater Treatment Plant*, NPDES Appeal No. 91-19, slip op. at 11 (Envtl. App. Bd. August 4, 1992); *In re Great Lakes Chemical Corp.*, NPDES Appeal No. 84-8, 1985 NPDES LEXIS 9, **15, 16 (September 3, 1985); *In re 446 Alaska Placer Mines*, NPDES Appeal No. 84-13, 1985 NPDES LEXIS 8, *3 (April 2, 1985); *In re NPDES Permit for: Public Serv. Co. of Oklahoma (Black Fox Station)*, NPDES Appeal No. 78-13, 1980 NPDES LEXIS 8, *7 (June 27, 1980); *In re NPDES Permits for Shell Oil Co.*, NPDES Appeal No. 78-8, 1979 NPDES LEXIS 4, *3 (February 27, 1979). In none of these decisions has EPA ever articulated or applied the summary judgment standard as set forth in Rule 56 or any comparable, similarly strict evidentiary standard. In fact, this Court also recognized that an evidentiary hearing may be attained in an NPDES proceeding where an "interested party raises a material issue of fact . . . [by] meet[ing] a threshold burden of tendering evidence suggesting the need for a hearing." *Costle v. Pacific Legal Found.*, 445 U.S. 198, 214 (1980) (citing *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. at 620-621). This is hardly an exposition of the Rule 56 standard or its jurisprudence.

Rather than acknowledging that the Board had made this significant departure from its regulations and its precedents, the First Circuit chose to explain the merits of "summary judgments" (App. A12), although PRASA did not question those merits, and to provide a rationale for the Board's actions and its failure to give notice of those actions:

> Though the Board had never before invoked Rule 56 in *haec verba* as a guide to section 124.75, any reasonable litigant familiar with administrative practice in general and with EPA's precedents in particular should have anticipated that it would be required to present evidence adequate to overcome the functional equivalent of a Rule 56 motion.

(App. A19.) There is neither textual nor precedential support for this rationale and, as Chief Judge Breyer stated in *Shaw's Supermarkets, Inc. v. NLRB*, 884 F.2d 34, 41 (1st Cir. 1989), "[u]nless an agency either follows or consciously changes the rules developed in its precedents, those subject to the agency's authority cannot use its precedents as a guide for their conduct; nor will that precedent check arbitrary agency action." To meet such a duty, *EPA* must provide a more "consistent judgment" to support its departure than a mere statement that its own explicit standard is "very similar" (App. A48) to a standard it did not write into its regulation.

The First Circuit's opinion also conflicts with decisions of this Court which hold that administrative agencies must explain their reasons for departing from previously recognized policies and standards. *Secretary of Agric. of United States v. United States*, 347 U.S. 645, 653-54 (1954). As part of its obligation to behave with "regularity," *Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 627 (1986), an administrative agency must "explain[ ] its departure from prior norms and . . . sufficiently spell[ ] out the legal basis of its decision . . . . 'with the simplicity and clearness through which a halting impression ripens into reasonable certitude.'" *Secretary of Agric.*, 347 U.S. at 653-54 (quoting *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 510-11 (1935)); *see also Atchison, Topeka & Santa Fe Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973).

The District of Columbia Circuit has posited the same rule, in conflict with the First Circuit's decision. In *Baltimore & Annapolis R.R. v. Washington Metro. Area Transit Comm'n*, 642 F.2d 1365 (D.C. Cir. 1980), the court stated that "when an agency decides to reverse its course, it must provide an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law." 642 F.2d at 1370 (quoting *Greyhound Corp. v. ICC*, 551 F.2d 414, 416 (D.C. Cir. 1977) (quoting *Columbia Broadcasting Systems, Inc. v. FCC*, 454 F.2d 1018, 1026 (D.C. Cir. 1971))); *see also United States v. Paddack*, 825 F.2d 504, 512 (D.C. Cir. 1987) (agency not accorded deference in sudden reversal of interpretation of its regulations); *Hatch v. FERC*, 654 F.2d 825, 837 (D.C. Cir. 1981); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied* 403 U.S. 923 (1971).

In *Hatch*, the District of Columbia Circuit confronted a situation similar to that in this case, in which a federal statute required the Federal Energy Regulatory Commission ("FERC") in rendering a decision, to find affirmatively that "neither public nor private interests will be adversely affected," 654 F.2d at 830 (quoting 16 U.S.C. § 825d(b)). FERC imposed a new legal standard, in which the petitioner had to demonstrate a "clear, overriding benefit" to meet the requirement. *Id.* at 834 n.19. FERC explained that its prior precedents had implied, although not specifically articulated, this new standard. *Id.* The Court rejected this explanation:

> Without any explicit recognition by the Commission that the standard has been changed, or any attempt to forthrightly distinguish or outrightly reject apparently inconsistent precedent, we are left with no guideposts for determining the consistency of administrative action in similar cases, or for accurately predicting future action by the Commission. The failure to admit or explain such a basic change in the interpretation of a

> statutory standard to be applied to conduct of the public undermines the integrity of the administrative process.

Id. at 834-35 (citations omitted).

The Fourth Circuit has followed this principle, *Baltimore Gas & Elec. Co. v. Heintz*, 760 F.2d 1408, 1418 (4th Cir.), *cert. denied*, 474 U.S. 847 (1985), as has the Fifth Circuit, *United Gas Pipe Line Co. v. FERC*, 597 F.2d 581, 586-88 (5th Cir. 1979), *cert. denied*, 445 U.S. 916 (1980); and despite its holding in PRASA's case, the First Circuit also has required administrative agencies to give notice, at least in the form of a reasoned explanation, for departures from prior precedents or standards. In *Shaw's Supermarkets*, 884 F.2d at 36, Chief Judge Breyer stated that the NLRB could not change its interpretation from previous precedents regarding what conduct constituted a "threat of reprisal" under the National Labor Relations Act "without explicitly recognizing that it is doing so and explaining why."

a. The First Circuit Exceeded Its Judicial Role By Providing A Rationale For The Agency's Arbitrary Behavior Where The Agency Provided None.

Effective judicial review does not oblige a court to "stand aside and rubber stamp" administrative agency decisions. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975) (quoting *NLRB v. Brown*, 380 U.S. 278, 291 (1965)). The courts may not abandon their role of ensuring that agency actions are both reasoned and reasonable.

The First Circuit exceeded the limited scope of its role of judicial review by substituting its own rationale, where the Board provided none, for the Board's departure from the established, explicit legal standard articulated in EPA's regulations and precedents. The First Circuit ignored the fact

that "[t]here are no findings and no analysis here to justify the choice made, no indication of the basis on which the [Board] exercised its expert discretion." *National R.R. Passenger Corp. v. Boston & Maine Corp.*, ___ U.S. ___, 112 S. Ct. 1394, 1407 (1992) (White, J., Blackmun, J. and Thomas, J., dissenting) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962)).

The First Circuit's strained explanation compounded further the Board's lack of reason. The First Circuit provided its own supposition of why the Board equated the two legal standards. (App. A17.) However, this Court has stated that a court may not review a rationale which an agency has failed to provide; "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). "'For the courts to substitute their or counsel's discretion for that of the [Board] is incompatible with the orderly functioning of the process of judicial review . . . .' [W]e should not strain the *Chevron* principle by deferring to what we imagine an agency had in mind when it applied a statute." *National R.R. Passenger Corp.*, 112 S. Ct. at 1407 (quoting *Burlington Truck Lines*, 371 U.S. at 169) (White, J., Blackmun, J. and Thomas, J., dissenting).

b. In Departing From The Established Evidentiary Standard Without Notice And Explanation Of Its Legal Reasons, The EPA And The First Circuit Have Altered The Burdens, Responsibilities And Order Of Presentations On PRASA.

The burdensome effect on PRASA of the Board's new Rule 56 summary judgment standard, as affirmed by the First Circuit, is harsh and fundamentally unfair in the context of *a request for an evidentiary hearing*. Notice and opportunity to meet a new regulatory standard is vital to the constitutional right to due

process. *Mathews v. Eldridge*, 424 U.S. 319, 333-34 (1976); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 611 & n.10 (1974); *Joint Anti-Fascist Refugee Comm'n v. McGrath*, 341 U.S. 123, 165-66 (1951) (Frankfurter, J., concurring); *Morgan v. United States*, 304 U.S. 1, 18-19 (1938); *West Ohio Gas Co. v. Public Utils. Comm'n of Ohio*, 294 U.S. 63, 70-71 (1935).

The difference between a "material issue of fact" and a "genuine issue of material fact" is significant. "A factual dispute is material where, under the governing law, it might affect the outcome of the proceeding." (App. A49.) The Board found that PRASA had raised such a material fact. (App. A49.) This finding should have yielded an evidentiary hearing.

The summary judgment standard requiring a "genuine" issue, on the other hand, assumes that the parties have had an opportunity to submit, weigh and challenge the credibility of evidence. Rule 56(c) of the Federal Rules of Civil Procedure makes that clear. *See, e.g, Smolen v. Deloitte, Haskins & Sells*, 921 F.2d 959, 963 (9th Cir. 1990); *Leonard v. Dixie Well Serv. & Supply, Inc.*, 828 F.2d 291, 293-94 (5th Cir. 1987); *Wisniewski v. Johns-Manville Corp.*, 812 F.2d 81, 84 (3d Cir. 1987). The parties also routinely engage in discovery under Rule 56. *See Parrish v. Board of Comm'rs*, 533 F.2d 942, 946-47 (5th Cir. 1976). None of these procedures occurred here. Even in federal court litigation, to defeat a Rule 56 motion for summary judgment and proceed to trial, a non-moving party would have only the burden to *raise* a "genuine issue of material fact," not to prove its case, and would do so with all inferences in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Greene v. Rash, Curtis & Assocs.*, 89 F.R.D. 314, 317 (E.D. Tenn. 1980). However, merely to obtain an evidentiary hearing from EPA, the new standard set forth in the Board's Order requires PRASA to transcend this burden *and* to prove its case "with a preponderance of the evidence," as would be required to *win* on the merits against EPA. (App. A51.)

In the absence of proper notice and reasoned explanation, such a summarily adopted new standard demonstrates that administrative agencies tread on dangerous ground when they seek to analogize "words" in an administrative rule to alluring, apparently identical "words" in the Federal Rules of Civil Procedure, which are designed and intended to effect a different purpose. This admonition is particularly warranted when, as here, the process -- a request for an evidentiary hearing -- affected by the new rule so dramatically affects PRASA's due process rights and disrupts the legal balance among burdens, responsibilities, and orders of presentations. *In re Detroit Plastic Molding Co.*, TSCA Appeal No. 87-7, 1990 TSCA LEXIS 2, ** 8-9 (March 1, 1990); *In re Wego Chemical & Mineral Corp.*, TSCA Appeal No. 92-4, 1993 TSCA LEXIS 91, ** 26-28 (February 24, 1993); *see, e.g., St. Mary's Honor Ctr. v. Hicks*, ___ U.S. ___, 113 S. Ct. 2742, 2751 (1993); *Costle v. Pacific Legal Foundation*, 445 U.S. at 214.

2. The First Circuit Failed To Acknowledge and To Accord Proper Deference To The Scientific Expertise And Findings Of Fact Of The United States Geological Survey.

An administrative agency deserves deference "when its conclusions are rationally based on articulated facts," *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 691 (1980). In order to determine the degree of deference to be given the Board, the First Circuit should have undertaken an exacting examination of the facts articulated by PRASA and the scientific findings in the USGS Report. It did not do so.

The First Circuit's opinion did not even mention the scientific findings of the USGS Report, nor did it mention the degree of deference merited by the USGS as an administrative agency with a Congressionally-recognized scientific expertise. The USGS was created in 1879, 43 U.S.C. § 31 (1988). Since that time, it has played an important role in providing scientific

expertise for state and federal government agencies and the judiciary. *See, e.g., Utah v. United States*, 780 F.2d 1515, 1521 (10th Cir. 1985), *rev'd on other grounds*, 482 U.S. 193 (1987). The USGS has special expertise with regard to water resources, and administers the Water Resources Act of 1984, Pub. L. No. 98-242, 98 Stat. 97, which applies expressly to Puerto Rico. *See* 30 C.F.R. § 401 (1993). In addition, the USGS exercises a statutory responsibility over water resources in Puerto Rico. *See* 43 U.S.C. § 49 (1988).

The USGS was the first and only federal agency to undertake an empirical study of the outfall site and the outfall's effects on the surrounding marine environment. EPA did not perform its own empirical studies. The USGS was, therefore, the only federal agency to use its scientific expertise in this case and was entitled to considerable deference with regard to factual questions involving its findings and conclusions. *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983); *Federal Power Comm'n v. Florida Power & Light Co.*, 404 U.S. 453, 463 (1972). The USGS undertook the primary factfinding responsibility for ascertaining whether PRASA met the requirements of Section 301(h)(2) and Section 125.61(f). As Justice O'Connor stated in *Baltimore Gas and Electric Co.*, "[w]hen examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential." 462 U.S. at 103. Accordingly, the actual scientific findings and conclusions of the USGS, not those findings as filtered through EPA's adjudicative lens, deserved deference.

The USGS Report which PRASA presented to EPA Region II resulted from a series of studies performed on the corals and marine life living in the area around the Mayaguez outfall. The USGS Report's goal was, *inter alia*, to determine the effects of the outfall on the indigenous marine population, *i.e.*, to determine whether the outfall met the requirements of Section 301(h)(2) and 40 C.F.R. § 125.61(f). Although the

USGS Report reached the conclusion that PRASA had satisfied Section 301(h)(2)'s requirement that the outfall did not interfere with a balanced indigenous marine population, both the Board and the First Circuit ignored this conclusion.

Rather than even mention the facts found by the USGS in its Report, the First Circuit focused on the *Board's* conclusions regarding PRASA's presentation of evidence to meet the three prongs of 40 C.F.R. § 125.61(f). The Board had found that PRASA had failed to present *any* evidence on Section 125.61(f)(3); and "therefore failed to raise a genuine factual issue warranting an evidentiary hearing." (App. A61.) Relying not on the USGS findings, or on their basis for analytic prediction, or on the absence of EPA guidance, or PRASA's actual submission, the Board dismissed as "uncertain" the effects of the outfall's discharge based on the Appendix 3 subordinate study. (App. A60.)

The First Circuit had a judicial responsibility to accord the USGS empirical findings the respect due them as findings resulting from the scientific expertise of a federal administrative agency. The First Circuit failed to fulfill this duty.

3. The First Circuit's Decision Conflicts With *Weinberger v. Hynson, Westcott & Dunning, Inc.*, By Denying An Evidentiary Hearing Based On EPA's Acknowledged Scientifically Imprecise And Speculative Regulations.

The First Circuit's denial of an evidentiary hearing based on its finding that PRASA had failed to present evidence on 40 C.F.R. § 125.61(f)(3) directly contradicts the Supreme Court's admonition in *Weinberger v. Hynson, Westcott, & Dunning, Inc.*, 412 U.S. 609, 621 n.17 (1972). In *Hynson*, the Court permitted the Food and Drug Administration ("FDA") to use an explicitly defined summary judgment procedure, *id.* at 622, and to deny an adjudicative hearing when an applicant for

new drug approval failed to tender any evidence which facially met the regulatory standards for a hearing. The Court cautioned, however, that such a summary dismissal procedure based on a study's apparent failure to present certain evidence

> applies, of course, only to those regulations that are precise . . . . [Some] qualitative standards . . . do not lend themselves to clear-cut definition, and it may not be possible to tell from the face of a study whether the standards have been met. Thus, it may not be possible to deny a hearing on the ground that the study did not comply with this regulation.

Id. at 621 n.17.

The FDA Commissioner anticipated that this distinction between precise and imprecise regulations would mean, in practice, that if the Commissioner had to use his judgment to determine whether facts presented in a study supported a new drug application, he could not deny a evidentiary hearing based on that judgment. If, however, the study presented "a total failure . . . even to attempt to comply" with the standards and presented no facts about which the Commissioner could even make a judgment, he could deny a hearing. *Smithkline Corp. v. Food & Drug Admin.*, 587 F.2d 1107, 1117 n.22 (D.C. Cir. 1978) (citing 39 Fed. Reg. 9750, 9757 (1974)).

EPA admitted that 40 C.F.R. § 125.61(f)(3) was imprecise when it promulgated the final rule, even advising the public that "EPA is unable to provide a specific guidance or suggested analytical procedures" by which to meet Section 125.61(f)(3)'s requirements, because of the extreme difficulty in demonstrating "a predictive analysis of biological responses to future pollution . . . ." 44 Fed. Reg. at 34806. EPA's inability even to suggest helpful procedures or factual showings by which applicants could meet Section 125.61(f)(3) demonstrates that this regulation, like the imprecise regulations anticipated in *Hynson*,

relies exclusively on EPA's judgment for determining whether an applicant has met the regulatory standards.

Before Region II and the Board, PRASA argued, as a basis for its request for a hearing, that the USGS Report and other previous scientific studies presented evidence that met Section 125.61(f)(3)'s requirement. PRASA stated to Region II and the Board that based on such scientific findings, "[t]he discharge at the Mayaguez RWWTP would not . . . retard the recovery of the marine biota if the level of human perturbation from sources of sediment in the watershed decreases." (App. A76); *see* (App. A82-85.) Moreover, as PRASA informed the First Circuit in its Petition For Review, the USGS Report

> . . . concluded that the Mayaguez discharge had *not* retarded biota recovery in three years of actual operation, even with sustained – let alone decreased – levels in other sources of pollution . . . . In its historical and empirical methodology, the USGS provided a scientific basis for the reasoned prediction necessary for (f)(3). It found, as a practical matter, 'causal relationships by systematic experiment . . . .' A proper scientific review of the USGS Report – not conducted by EPA – demonstrates that PRASA has complied with Section 125.61(f)(3) or, at the very least, has established a dispute of material, relevant facts warranting an evidentiary hearing.

PRASA's Brief in Support of Petition for Review to the First Circuit at 40 (March 16, 1994). Both the Board and the First Circuit foreclosed *any* reasonable burden on EPA to consider such evidence, contrary to the admonition in *Hynson* that an agency should not deny a hearing when evidence is presented to meet imprecise regulatory requirements that deliberately lack scientific guidance.

CONCLUSION

The Petition for a writ of certiorari should be granted so that the Court may require the Board to employ consistent legal and factfinding standards in EPA's grants of evidentiary hearings and to provide notice when it chooses to depart from those standards. Additionally, the writ should be granted to allow the Court to re-establish the proposition that an administrative agency must provide parties with a reasoned articulation of the decision's factual and legal basis when it undertakes such a departure. The Petition also should be granted because the First Circuit misconceived its powers of judicial review by providing a rationale for a Board decision which lacked an explanation, and by ignoring significant evidence presented by the USGS, which deserved deference for its empirical findings, especially in light of EPA's acknowledged scientific imprecision in its regulations and in the absence of EPA's own empirical studies.

Respectfully submitted,

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November 28, 1994

Counsel for Petitioner

APPENDIX

APPENDIX A

No. 93-2340

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PUERTO RICO AQUEDUCT AND SEWER AUTHORITY,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

35 F.3d 600

August 31, 1994

PETITION FOR REVIEW OF AN ORDER OF THE ENVIRONMENTAL APPEALS BOARD

Before Selya and Cyr, Circuit Judges, and Pettine, * Senior District Judge.

* Of the District of Rhode Island, sitting by designation.

Neil T. Proto, with whom John B. Britton, Lisa K. Hsiao, Verner, Liipfert, Bernhard, McPherson & Hand, Chartered, Edgar Rodriguez-Mendez, and Jorge Marrero-Narvaez were on brief, for petitioner.

Michael J. Zevenbergen, Attorney, U.S. Dep't of Justice Environmental Defense Section, with whom Lois J. Schiffer, Acting Assistant Attorney General, Stephen J. Sweeney (Office of General Counsel, EPA), and Janice Whitney (Office of Regional Counsel, EPA Region II), were on brief, for respondent.

SELYA, Circuit Judge. The United States Environmental Protection Agency (EPA), respondent before us, refused to hold an evidentiary hearing regarding its determination that a facility in Mayaguez owned by petitioner, Puerto Rico Aqueduct and Sewer Authority (PRASA), must fully meet the Clean Water Act's secondary treatment requirements for publicly owned treatment works (POTWs). The gist of EPA's decision was straightforward: having previously established secondary treatment requirements because PRASA's POTW emitted pollutants into stressed waters, it determined that PRASA had failed to proffer any legally cognizable basis for modifying the requirements.

Petitioner now seeks judicial review of this determination. Its flagship objection demands that we place in bold relief the concept of administrative summary judgment. Petitioner's less touted objections implicate the agency's "stressed waters" standards.[1/] Descrying no flaw in EPA's application of either its procedural or substantive regulations, we affirm.

[1/] "Stressed waters" are "those receiving environments in which an applicant can demonstrate to the satisfaction of the Administrator, that the absence of a balanced, indigenous population is caused solely by human perturbations other than the applicant's modified discharge." 40 C.F.R. § 125.58(t) (1993).

I. STATUTORY AND REGULATORY FRAMEWORK

Under the Clean Water Act, no pollutant may be emitted into this nation's waters except in compliance with a National Pollution Discharge Elimination System (NPDES) permit. *See* 33 U.S.C. § 1311(a) (1988). Ordinarily, the NPDES permit issued to a POTW includes certain technology-based standards known as secondary treatment requirements. *See id.* § 1311(b)(1)(B). A POTW can obtain relief from these requirements by meeting nine separate criteria. These criteria are limned in 33 U.S.C. § 1311(h). They require the applicant to make various demonstrations regarding matters such as: the effects of the discharge on other sources and on marine life; standards and procedures for monitoring the discharge; and methods of ensuring control over the sources introducing waste into the POTW. Of this ennead, only the second criterion, embodied in section 1311(h)(2), is relevant to this appeal.[2/]

> To satisfy section 1311(h)(2), a POTW must show that the discharge of pollutants in accordance with such modified requirements will not interfere, alone or in combination with pollutants from other

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[2/] While EPA's initial decision may be read to rest in part on PRASA's failure to satisfy subsections 1311(h)(1) and (h)(9), as well as (h)(2), the Environmental Appeals Board did not reach those issues, *see In re Mayaguez Regional Sewage Treatment Plant*, NPDES Appeal No. 92-93 (August 23, 1993), slip op. at 9 n.13. Since the initial decision constitutes final agency action only when the Board denies review or summarily affirms, *see* 40 C.F.R. § 124.91(f) (1993), not where, as here, the Board writes a full opinion, we decline EPA's invitation that we decide the case under either (h)(1) or (h)(9).

> sources, with the attainment or maintenance of that water quality which assures protection of public water supplies and the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife, and allows recreational activities, in and on the water . . . .

33 U.S.C. § 1311(h)(2) (1988). The information necessary for a section 1311(h)(2) demonstration is described by the implementing regulation, under which an applicant who cannot meet the requirements of 40 C.F.R. § 125.61(a)-(e) due to "human perturbations" other than its modified discharge must meet the stressed waters requirements of 40 C.F.R. § 125.61(f). Under these requirements, the applicant must demonstrate that its discharge will not:

> (1) contribute to, increase, or perpetuate such stressed conditions;
>
> (2) contribute to further degradation of the biota or water quality if the level of human perturbation from other sources increases; and
>
> (3) retard the recovery of the biota or water quality if the level of human perturbation from other sources decreases.

40 C.F.R. § 125.61(f) (1993). For ease of comprehension, we sometimes will refer to the (f)(1) showing as the "current impacts" showing and the (f)(3) showing as the "future impacts" showing. Although the (f)(2) showing would seem to be intimately related to the

(f)(3) showing, it was not discussed in the proceedings below and, therefore, is not a matter of current concern.

Unlike typical NPDES permit proceedings, EPA makes a tentative decision to grant or deny section 1311(h) modifications prior to proposing a permit. *See* 40 C.F.R. § 125.59(d) (1993). A POTW that has submitted a timely application for such modification may revise it once as of right. *See id.* § 125.59(d)(1). EPA also may authorize or request the submission of additional information. *See id.* § 125.59(f)(1).

After issuance of a tentative decision, followed by public notice and opportunity for written comment, EPA makes a final determination in regard to the proposed action. *See* 40 C.F.R. § 124.15 (1993). That decision becomes the final permit, effective in thirty days, unless it is administratively appealed. *See id.* § 124.15(b). If an appeal is taken, a party may request an evidentiary hearing to contest the resolution of any question raised in the earlier proceedings. *See id.* § 124.74(a). The request must specifically identify the legal and factual issues and their relevance to the permit decision. *Id.* § 124.75(b)(1). EPA's Regional Administrator then grants or denies the request. *Id.* § 124.75(a)(1).

If a request for an evidentiary hearing is denied, the denial becomes final agency action within thirty days unless a protest is filed with the Environmental Appeals Board (the Board). *See id.* §§ 124.60(c)(5), 124.91. In turn, an order by the Board abjuring review renders final the Regional Administrator's previous decision. *See id.* § 124.91(f)(1).

II. PROCEDURAL BACKGROUND

This case aptly illustrates how the regulatory scheme works. PRASA initially sought a section 1311(h) modification for its Mayaguez sewage facility by application dated September 13, 1979. EPA, hampered by delays in obtaining input from local environmental officials, did not issue a tentative denial of the request until February 6, 1984. One year later, after PRASA presented a revised application, EPA issued another tentative denial. On December 13, 1991, following notice, comment, and a two-day public hearing, EPA dashed PRASA's hopes by issuing a final denial of its request for modification.

Hope, of course, often springs eternal, *see* Alexander Pope, *An Essay on Man*, Epistle 1 (1734), and PRASA's hopes of obtaining a modification were renewed in 1992 by a United States Geological Survey (USGS) report that contained some conclusions helpful to PRASA's cause. PRASA commenced its administrative appeal of EPA's final denial by submitting a request for an evidentiary hearing accompanied by the draft USGS study. On July 23, 1992, the USGS report notwithstanding, EPA Region II rejected PRASA's request for an evidentiary hearing. The Board affirmed. *See In re Mayaguez Regional Sewage Treatment Plant*, NPDES Appeal No. 92-93 (August 23, 1993) (Board Op.). PRASA immediately invoked 33 U.S.C. § 1369(b) and petitioned for judicial review.

In a passage that frames the central battleground in this venue, the Board self-consciously construed the procedural standard governing requests for evidentiary hearings, 40 C.F.R. § 124.75, to necessitate the presence of a "genuine issue of material fact" as a prerequisite to

avoiding summary disposition of requests for review, Board Op. at 11. The Board characterized this requirement as "very similar to the requirement set forth in Rule 56 of the Federal Rules of Civil Procedure." *Id.*; *see also id.* at 13 (explaining that the Board's standard and the Rule 56 standard are "for our purposes virtually identical"). Warming to the task, the Board lauded case law dealing with Rule 56 as offering "useful guidance" in connection with section 124.75, *id.* at 11, and proclaimed that the Rule 56 standard "should be applied in the context of evidentiary hearing requests as well," *id.* at 13.

Scrutinizing the record through this prism, the Board held that PRASA did not merit a hearing because it had not presented a genuine issue of material fact as to either the current impacts showing required under 40 C.F.R. § 125.61(f)(1) or the future impacts showing required under 40 C.F.R. § 125.61(f)(3). Put another way, the Board thought that no evidentiary hearing should be convened because PRASA had not adduced sufficient proof from which a reasonable decisionmaker could find, by a preponderance of the evidence,[3/] either that the Mayaguez POTW was not currently contributing to the stressed condition of the surrounding waters, or that the facility would not in the future inhibit recovery of the surrounding stressed waters in the event that other stresses relented.

[3/] The Board routinely applies the preponderance standard in permit determinations. *See* Board Op. at 13 n.18. This is of some consequence for present purposes because Rule 56 frequently implicates the substantive burdens of proof that would apply if the particular case went forward uninterrupted. *See Villanueva v. Wellesley Coll.*, 930 F.2d 124, 129 (1st Cir.), *cert. denied*, 116 L. Ed. 2d 143, 112 S. Ct. 181 (1991).

See id. at 15-18. This ruling was tantamount to the entry of summary judgment, effectively terminating PRASA's administrative appeal.

III. STANDARD OF REVIEW

We are mindful that we operate at the busy intersection of three deferential standards of review. In the first place, agency decisions made by informal adjudication may be set aside only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1988); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983); *Sierra Club v. Marsh*, 976 F.2d 763, 769 (1st Cir. 1992). In the second place, an agency deserves an extra measure of deference with regard to factual questions involving scientific matters in its area of expertise. *See, e.g., Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103, 76 L. Ed. 2d 437, 103 S. Ct. 2246 (1983); *FPC v. Florida Power & Light Co.*, 404 U.S. 453, 463, 30 L. Ed. 2d 600, 92 S. Ct. 637 (1972); *Town of Brookline v. Gorsuch*, 667 F.2d 215, 219-20 (1st Cir. 1981). Mixed questions of law and fact, at least to the extent that they are fact-dominated, fall under this rubric. See *Gorsuch*, 667 F.2d at 220; cf. *In re Howard*, 996 F.2d 1320, 1327-28 (1st Cir. 1993) (recognizing that appeals in the federal court system are usually arrayed along a degree-of-deference continuum in which deference increases in proportion to the factual component of the determination). And, finally, the respect usually accorded an agency's interpretation of a statute it is charged to execute, *see Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-45, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984), is

magnified when the agency interprets its own regulations, *see, e.g., Arkansas v. Oklahoma*, 117 L. Ed. 2d 239, 112 S. Ct. 1046, 1059-60 (1992); *Commonwealth of Mass., DPW v. Secretary of Agric.*, 984 F.2d 514, 524 (1st Cir. 1993) (citing cases).

IV. ADMINISTRATIVE SUMMARY JUDGMENT

In this court, PRASA hawks most vigorously a claim of procedural error. This claim spotlights the Board's interpretation of EPA's standard for dispensing (or dispensing with) evidentiary hearings, especially its conclusion that the text of the applicable regulation, 40 C.F.R. § 124.75(a)(1) (stipulating that, to warrant an evidentiary hearing and deflect administrative summary judgment, the non-moving party must establish the existence of "material issues of fact relevant to the issuance of the permit"), should be read as the functional equivalent of Fed. R. Civ. P. 56(c) (which authorizes summary judgment if there is "no genuine issue as to any material fact," and thereby requires the non-moving party to establish the existence of a genuinely disputed material fact to forestall summary judgment). Section 124.75, PRASA asserts, contains no "genuineness" requirement, and, moreover, even if the Board had the authority to read a "genuineness" requirement into the regulation, it could not do so without giving advance notice. We find no merit in these assertions.

The Structure of Administrative Summary Judgment

In erecting an adjudicatory framework that included an administrative summary judgment procedure, EPA necessarily contemplated that, to qualify for an evidentiary

hearing, a party would have to present a genuine and material dispute. Those tworequirements are inherent in the very concept of administrative summary judgment. Any other assumption borders on the chimerical: under federal case law, a "material" fact is one that may affect the outcome of the case, *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *United States v. One Parcel of Real Property*, 960 F.2d 200, 204 (1st Cir. 1992); a "genuine" fact dispute is one that a reasonable decisionmaker could decide in favor of either party under the applicable standard of proof, or in other words, one that is worthy of being more fully adjudicated (trialworthy in the courts' parlance; hearing-worthy in the agencies' parlance).[4/] *See Liberty Lobby*, 477 U.S. at 248-49; *One Parcel*, 960 F.2d at 204. To force an agency fully to adjudicate a dispute that is patently frivolous, or that can be resolved in only one way, or that can have no bearing on the disposition of the case, would be mindless, and would suffocate the root purpose for making available a summary procedure. Indeed, to argue -- as does petitioner -- that a speculative or purely theoretical dispute -- in other words, a non-genuine dispute -- can derail summary judgment is sheer persiflage.

We think that EPA's regulations lawfully can be read to incorporate this binary test, featuring genuineness and materiality. What is more, we refuse to attach talismanic significance to the absence of the stock phrase "genuine issue of material fact." The reference found in 40 C.F.R.

[4/] While these definitions developed in the milieu of Rule 56, they are by no means limited to that milieu.

§ 124.75(a)(1) to "material" issues of "relevant" fact achieves precisely the same end. In practice, courts and agencies regularly use a variety of terms to describe the two pillars of summary judgment.

We hasten to add that, despite this linguistic equivalency, explicitly drawing a connection to Rule 56 accomplishes three things. First, it provides a common vocabulary, easily understandable by litigants, lawyers, and adjudicators. Second, it introduces into an agency's jurisprudence a ready-made ensemble of decisional precedents associated with Rule 56, *see, e.g., Garside v. Osco Drug, Inc.*, 895 F.2d 46, 48 (1st Cir. 1990) (holding that at the summary judgment stage the evidence must be examined in the light most favorable to the nonmovant). Third, it carries with it certain expectations, conditioned by everyday experience in the federal courts, about the kind and degree of evidence deemed necessary to create a genuine dispute over a material fact. *See, e.g., Liberty Lobby*, 477 U.S. at 249-50 (explaining that to withstand summary judgment, evidence must be "significantly probative"); *Garside*, 895 F.2d at 49-50 (discussing type and kind of opinion evidence that may forestall summary judgment).

Notwithstanding the obvious advantages of drawing a parallel between the courts' and the agencies' versions of summary judgment, petitioner contends that the Board went too far too fast. In support, PRASA posits three interrelated arguments: (1) that summary judgment, as it exists in the courts, has no legitimate place in agency practice; (2) that administrative summary judgment does not carry with it the baggage of Rule 56; and (3) that, in all events, EPA took an impermissible shortcut and

embraced a Rule 56 standard precipitously, without affording fair notice or an opportunity to respond. These arguments lack force.

The Validity of Administrative Summary Judgment

The choice between summary judgment and full adjudication -- in virtually any context -- reflects a balancing of the value of efficiency against the values of accuracy and fairness. Seen in that light, summary judgment often makes especially good sense in an administrative forum, for, given the volume of matters coursing through an agency's hallways, efficiency is perhaps more central to an agency than to a court. *See* Charles C. Ames & Steven C. McCracken, *Framing Regulatory Standards to Avoid Formal Adjudication: The FDA As a Case Study*, 64 Cal. L. Rev. 14, 34-35 (1976). At the same time, summary judgment is less jarring in the administrative context; after all, even under optimal conditions, agencies do not afford parties full-dress jury trials. Taking these factors into account, it is unsurprising that most major agencies in the federal system have opted to make available procedures for the summary disposition of adjudicatory matters. *See, e.g.*, 10 C.F.R. § 2.749 (1994) (NRC); 16 C.F.R. § 3.24 (1994) (FTC); 21 C.F.R. § 12.93 (1994) (FDA); 47 C.F.R. § 1.251 (1993) (FCC); 40 C.F.R. §§ 22.20, 124.75, 164.91 (1993) (EPA); 29 C.F.R. 102.35(h) (1993) (NLRB); 29 C.F.R. § 2200.2 (1993) (OSHA).[5/]

[5/] An important exception is the SEC. *See* Rules of Practice, Exchange Act Release No. 33,163 [1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85,257, at 84,742 (Nov. 5, 1993) (rejecting Rule 56 (continued...)

Administrative summary judgment is not only widely accepted, but also intrinsically valid. An agency's choice of such a procedural device is deserving of deference under "the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure." *Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S.* 519, 544, 55 L. Ed. 2d 460, 98 S. Ct. 1197 (1978). Applying this tenet, the Court has upheld an assortment of summary procedures, some closely resembling Rule 56, in the face of claims that the procedures are invalid because they deprive parties of their "right" to a hearing before the agency. *See Heckler v. Campbell*, 461 U.S. 458, 467, 76 L. Ed. 2d 66, 103 S. Ct. 1952 (1983); *National Indep. Coal Operators' Ass'n v. Kleppe*, 423 U.S. 388, 398-99, 46 L. Ed. 2d 580, 96 S. Ct. 809 (1976); *FPC v. Texaco Inc.*, 377 U.S. 33, 39-44, 12 L. Ed. 2d 112, 84 S. Ct. 1105 (1964); *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 205, 100 L. Ed. 1081, 76 S. Ct. 763 (1956); *see also Ames & McCracken, supra*, at 41 n.164 (listing cases to similar effect involving different agencies). Most significantly for our purposes, the Court has given its seal of approval to a highly analogous summary procedure for denial of a hearing, *see Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 621, 37 L. Ed. 2d 207, 93 S. Ct. 2469 (1973) (involving FDA's procedure for administrative summary judgment), and to an earlier version of the very procedure that we review today, *see Costle v. Pacific Legal Found.*,

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5/(...continued)
model on grounds that SEC practice does not permit discovery or prehearing affidavits).

445 U.S. 198, 214, 63 L. Ed. 2d 329, 100 S. Ct. 1095 (1980).[6/]

Petitioner's claim of invalidity consists mainly of rhetorical flourishes and cannot scale this mountain of case law. Due process simply does not require an agency to convene an evidentiary hearing when it appears conclusively from the papers that, on the available evidence, the case only can be decided one way. *See Hynson*, 412 U.S. at 621. It follows that administrative summary judgment, properly configured, is an acceptable procedural device.

Applicability of Rule 56 Precedents

Petitioner's attempt to break the bond between administrative summary judgment and its courtroom counterpart is similarly unavailing. From its inception, the concept of administrative summary judgment has been linked inextricably to Fed. R. Civ. P. 56. In all probability, it was Professor Davis who first forged this link. He wrote: "Some agencies might well take a leaf from the federal rules of civil procedure and permit summary judgment without evidence when no issue of fact is presented." 1 Kenneth C. Davis, *Administrative Law Treatise* § 8.13, at 578 (1958). A dozen years later, two other leading administrative law scholars seized upon this sentence and developed it into a highly influential report to

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[6/] *Costle* dealt with the direct ancestor of 40 C.F.R. § 125.75(a)(1), namely, 40 C.F.R. § 125.36(c)(1)(ii) (1979). The Court held that the EPA lawfully could "limit any adjudicatory hearing to the situation where an interested party raises a material issue of fact." 445 U.S. at 214.

the Committee on Agency Organization and Procedure of the Administrative Conference of the United States. *See* Ernest Gellhorn & William F. Robinson, Jr., *Summary Judgment in Administrative Adjudication*, 84 Harv. L. Rev. 612 (1971) (rendering the report in article form).

Consistent with the circumstances of its birth, administrative summary judgment has maintained a close relationship with Rule 56. Many agencies habitually look to Rule 56 case law for guidance in respect to administrative summary judgments. *See, e.g., Phillips Pipe Line Co. v. Phillips Pipe Co.*, 1994 FERC LEXIS 757, at *3 (April 26, 1994) (applying 18 C.F.R. § 385.217); *United States v. Scotto Bros. Woodbury Restaurant, Inc.*, 1993 OCAHO LEXIS 95, at *14 (December 7, 1993) (outlining practice in Executive Office for Immigration Review). Other agencies, like EPA in the present context, have taken the step of formalizing the relationship. *See, e.g.*, 29 C.F.R. § 2200.2 (1993) (making Rule 56 directly applicable to proceedings before OSHA); *see also In re Summary Decision Procedures*, 34 F.C.C.2d 485, 487-88 (1972) (characterizing an FCC summary disposition regulation, 47 C.F.R. § 1.251(a)(1), as "essentially the same" as Rule 56).

In view of this history, one respected court has gone so far as to say, perhaps overbroadly, that the principles of summary judgment outlined in Liberty Lobby "apply with equal force in the context of administrative judgment." *John D. Copanos & Sons, Inc. v. FDA*, 854 F.2d 510, 523 (D.C. Cir. 1988). We take a more circumspect view. In our opinion, Rule 56 is the prototype for administrative summary judgment procedures, and the jurisprudence that has grown up around Rule 56 is, therefore, the most fertile

source of information about administrative summary judgment. Thus, "with minor individual modifications, the summary judgment procedures should be similar in most agencies [to those under Rule 56]." 1 Charles H. Koch, Jr., *Administrative Law & Practice* § 5.78, at 419 (1985). Hence, we reject petitioner's contention that Rule 56 precedents are inapposite in proceedings before administrative agencies.

Departure from Precedent

The linchpin of petitioner's final procedural argument is the notion that the Board broke new ground in patterning its inquiry after Rule 56. We disagree.

It is well established that agencies are free to announce and develop rules in an adjudicatory setting. *See, e.g., NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294, 40 L. Ed. 2d 134, 94 S. Ct. 1757 (1974). Of course, there are limits on this freedom. As a general matter, when an adjudicating agency retroactively applies a new legal standard that significantly alters the rules of the game, the agency is obliged to give litigants proper notice and a meaningful opportunity to adjust.[7/] *See, e.g., Aero Mayflower Transit Co. v. ICC*, 699 F.2d 938, 942 (7th Cir. 1983); *Hatch v. FERC*, 654 F.2d 825, 835 (D.C. Cir. 1981). By the same token, an agency 'cannot depart significantly from prior precedent without explicitly

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[7/] While this requirement derives in part from a section of the Administrative Procedure Act that applies only to full-fledged hearings, *see* 5 U.S.C. § 554(b)(3) (1988), the requirement is grounded on general considerations of fairness. Accordingly, we see no reason why it should not also apply to adjudicative proceedings.

recognizing that it is doing so and explaining why.'" *Congreso de Uniones Industriales v. NLRB*, 966 F.2d 36, 39 (1st Cir. 1992) (citation omitted); *accord Davila-Bardales v. INS*, ___ F.3d ___, (1st Cir. 1994) [No. 93-2124, slip op. at 8].

These principles do not assist petitioner's cause. Though petitioner asseverates that, in the proceedings below, EPA abruptly adopted a new legal standard that substantially changed the showing required of a party seeking an evidentiary hearing, this scenario is more imagined than real. Here, the record reflects neither a departure from precedent nor an alteration of the required showing. To the contrary, the Board's approach to section 124.75 proceeds naturally from its earlier construction of the provision and falls well within the mainstream of its previously established practice. We explain briefly.

Although the Board never before has made the equation between Rule 56 and EPA's summary judgment procedure so explicit, it traditionally has equated its procedural standard for denial of an evidentiary hearing anent an NPDES permit with the Rule 56 yardstick. On at least three prior occasions, the Board suggested that section 124.75's reference to the presentation of "material issues of fact relevant to the issuance of the permit" requires the nonmovant to set forth a "genuine issue of material fact." *See In re City of Jacksonville, Etc.*, NPDES Appeal No. 91-19 (Aug. 4, 1992), slip op. at 2; *In re Miami-Dade Water & Sewer Auth. Dep't*, NPDES Appeal No. 91-14 (July 27, 1992), slip op. at 17; *In re*

Great Lakes Chem. Corp., NPDES Appeal No. 84-8 (Sept. 3, 1985), slip op. at 4.[8/]

Then, too, EPA has long espoused the view, in a wide variety of settings, that while the Civil Rules are not binding on agencies, they may inform administrative practice in appropriate situations. *See, e.g., In re Harmon Elecs., Inc.*, 1993 RCRA LEXIS 113 at *9-*10 (Aug. 17, 1993); *In re Premier Metal Prods.*, 1992 RCRA LEXIS 156, at *2 (Dec. 23, 1992). This is an approach rather consistently followed both by EPA, *see, e.g., In re Wego Chem. & Mineral Corp.*, 1993 TSCA LEXIS 91, at *25-*26 (Feb. 24, 1993), and by the federal courts, *see, e.g., Amberg v. FDIC*, 934 F.2d 681, 685 (5th Cir. 1991) (suggesting that administrative decisionmakers should look for guidance to the Civil Rules when interpreting regulations containing concepts or language derived in part from those rules).

In sum, the procedure to which PRASA objects did not spring suddenly and unannounced from EPA's bureaucratic brow. Rather, by the time that the agency

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[8/] *Great Lakes* is of special interest, for in that case the EPA made manifest that it considered the term "material" as used in section 124.75 to be akin to the federal courts' definition of "genuine" under Rule 56. After making a casual reference to Rule 56's language, the Board concluded, using the terms contained in section 124.75, that the petitioner's evidence was "relevant" but not "material." It was not "material," the Board explained, because "evidentiary hearings [should not] be granted whenever a party makes a bare assertion, without anything more, that a permit's monitoring requirements should be reduced or modified -- this would hopelessly crowd hearing dockets and clearly is not in accord with the purposes of . . . the Agency's regulations." *Great Lakes*, at 14.

decided this case, the concept that only the presence of a genuine issue about a material fact could forestall *brevis* disposition had taken deep root in administrative soil. Thus, PRASA should have known all along that it would be expected to present a genuine and material dispute in order to earn an evidentiary hearing. Though the Board had never before invoked Rule 56 in *haec verba* as a guide to section 124.75, any reasonable litigant familiar with administrative practice in general and with EPA's precedents in particular should have anticipated that it would be required to present evidence adequate to overcome the functional equivalent of a Rule 56 motion.[9/]

Little more need be said. The Board's use of Rule 56 here was consistent both with its prior practice and with prevalent understandings of administrative summary judgment. Thus, the Board's articulation, albeit "new" in a certain sense, falls well within the range of hitherto unspoken principles that appropriately may be announced in the course of rendering an adjudicative determination. *See Bell Aerospace*, 416 U.S. at 294; *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03, 91 L. Ed. 1995, 67 S. Ct. 1575 (1947); *Molina v. INS*, 981 F.2d 14, 22-23 (1st Cir. 1992).

In the last analysis, courts must take a practical, commonsense view of the restrictions that constrain an

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[9/] In any event, to the extent (if at all) that PRASA failed to realize that Rule 56 would inform the Board's decision about whether to hold a hearing, we fail to see how it was prejudiced. For aught that appears, PRASA's evidentiary presentation would not have differed; to this date it has been unable to deterrate any proof sufficient to create a genuine issue about either current or future impacts.

agency's freedom to alter prior practices. Those restrictions, properly construed, do not lock an agency into a position where it invariably must parrot the same phrases or perpetually chant the same mantra. Reasonable refinement and reformulation are both permissible and advisable in administrative adjudication. Nothing more transpired here.

V. THE STRESSED WATERS SHOWINGS

We now move from the procedural to the substantive. In scrutinizing an order of an agency denying an evidentiary hearing, a reviewing court must determine whether the agency's findings accurately mirror the record, and if they do, whether those findings warrant denial of a hearing under the pertinent regulations. *See Hynson*, 412 U.S. at 622. In this instance, the first part of the inquiry tells the tale, for, if PRASA failed to present evidence adequate to create a genuine issue of material fact on one or more critical criteria, as EPA found, then EPA properly denied the requested hearing.

The Future Impacts Showing

Under 40 C.F.R. § 125.61(f)(3), it was incumbent upon PRASA to show, *inter alia*, that the emissions from the Mayaguez POTW would not "retard the recovery of the biota or water quality if the level of human perturbation from other sources decreases." In promulgating this requirement, EPA recognized that it was erecting a high hurdle. Indeed, it stated in a preamble to the regulations:

> As a practical matter, it will be extremely difficult for most applicants discharging into stressed waters to demonstrate that their discharge will meet the requirements of section 125.61. As a factual matter, the discharge of additional pollutants into an already polluted marine environment virtually always increases or contributes to adverse impact; it is extremely difficult, as a practical matter, to demonstrate that it does not.

44 Fed. Reg. 34,784, 34,806 (June 15, 1979).

EPA concluded that PRASA had not cleared this hurdle, and the Board concurred. It noted that the studies submitted by petitioner -- principally the USGS report -- addressed only the current impacts of the facility's emissions relative to the current impacts of all other emissions, and did not purport to make predictions regarding future impacts. *See* Board Op. at 15-16. Accordingly, without defining exactly what type of evidence might surmount the (f)(3) hurdle, the Board determined that petitioner's effort came up short. If this determination holds water, then the agency had a right summarily to deny the petition.[10/]

[10/] PRASA makes a rather convoluted threshold argument that implicates the order of the showings which must be made to secure modification of secondary treatment requirements. In this case, we doubt that the order of the showings makes the slightest difference. Moreover, there is absolutely no basis for believing either that the showings must be made in a particular sequence, or that separate hearings must be held for each showing. Absent a contrary indication

(continued...)

This reasoning finds a striking parallel in *Hynson*. There the Court agreed that an agency was not required to "provide a formal hearing where it is apparent at the threshold that the applicant has not tendered any evidence which on its face meets the statutory standards as particularized by the regulations," *Hynson,* 412 U.S. at 620 (emphasis in the original). Spurred by Hynson, *see id.* at 621 n.17, FDA soon thereafter announced that, with regard to an imprecise regulation, a study would not conclusively be deemed inadequate unless it totally failed "even to attempt to comply." *See* 39 Fed. Reg. 9757 (Mar. 13, 1974). Since that time, the courts have upheld FDA's summary denials of hearings under this policy. As the District of Columbia Circuit explained:

> [E]ven "a regulatory provision which seems vague in the abstract may nonetheless be conclusively at odds with a peculiarly deficient item of evidence." Thus . . . summary judgment may be entered not only for failure to comply with precise regulations, but also "on the basis of manifest noncompliance with general statutory or regulatory provisions . . . ."

Copanos, 854 F.2d at 522 (citations omitted). We agree. Although in some cases an imprecise regulation may

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10/(...continued)
in the regulation itself -- and none exists here -- we think it is fair to assume that a party must satisfy every element of a provision written in the conjunctive. *See WJM, Inc. v. Massachusetts DPW*, 840 F.2d 996, 1011 (1st Cir. 1988); *Donovan v. Burger King Corp.*, 672 F.2d 221, 227 (1st Cir. 1982); *see also* 1A Norman J. Singer, *Sutherland Stat. Constr.* § 21.14 (5th ed. 1993).

require an agency to give an applicant the benefit of the doubt regarding a summary decision, other cases will be so clear-cut as to warrant summary adverse action, notwithstanding the imprecision in the agency's standards. We believe the present case falls into the heartland of the latter category.

The Board's reasoning is also hauntingly reminiscent of *Buttrey v. United States*, 690 F.2d 1170 (5th Cir. 1982), *cert. denied*, 461 U.S. 927, 77 L. Ed. 2d 298, 103 S. Ct. 2087 (1983), a case involving the Clean Water Act. There, the court of appeals agreed that the Army Corps of Engineers need not hold a hearing on every application for a permit to discharge dredged or fill material into navigable waters. *Id.* at 1174-83. One reason given was that the petitioner apparently decided not even to attempt to make the three showings required under [the applicable regulations]. Procedural improvements in the nature of trial-type safeguards could do nothing to remedy so fundamental a flaw in the prima facie case. *Id.* at 1183 (footnote omitted).

PRASA does not deny that its studies failed to draw direct conclusions regarding future impacts.[11/] Instead, it attempts to discredit EPA's interpretation of the future impacts regulation, labelling it absolutist. This fusillade

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[11/] PRASA does offhandedly suggest that its studies make the requisite showing *indirectly*. Compliance with (f)(1), PRASA muses, might in some cases provide a scientific basis for the prediction required by (f)(3). While that may (or may not) be so in theory, it is certainly not so on the facts of this case. Here, PRASA's showing of no current impacts was weak at best, *see infra* note 12, and cannot support the weight of the proposed inference.

misses the mark. Though an absolutist interpretation, rendering modifications of secondary treatment requirements for emissions into stressed waters unobtainable, might well be problematic, we do not read the Board's opinion in that fashion.

In considering this issue, the Board refused to presume, absent scientific evidence, that a large quantity of lightly treated sewage -- estimated as 850 tons per year -- would have no impact on the surrounding stressed waters in the event that other stresses abated. *See* Board Op. at 15-16. This neither betokens an absolutist mindset nor forecloses the possibility that the Board might entertain a presumption of no future harm if presented with the prospect of more modest emissions. Nor does the Board's opinion foreclose the possibility that it might find a scientific showing of no future impacts to be persuasive. On the contrary, after noting EPA's "great reluctance" to sanction emissions into stressed waters, the Board made a point of leaving the door ajar:

> This is not to say that there is no case where discharges into stressed waters would be allowed. Where, for example, the receiving waters are stressed by pollutants other than those in the proposed discharge and such pollutants do not contribute to existing stresses, a § 301(h) permit may be appropriate.

Id. at 18 & n.22.

To say more would be to paint the lily. We conclude that EPA did not promulgate an absolutist standard. And, moreover, we find the Board's rendition of the evidence to

be faithful to the record, its reasoning to be sound, and its position to be well-supported by authority. Consequently, we hold that the Board acted within its authority in denying petitioner an evidentiary hearing and summarily terminating the administrative appeal on the ground that the studies submitted by petitioner failed to make any attempt to satisfy the strictures of 40 C.F.R. § 125.61(f)(3).[12/]

VI. CONCLUSION

We need go no further. PRASA's application for modification and its concomitant request for an evidentiary hearing were fairly considered and appropriately rejected. For the reasons set forth herein, we uphold the agency's final action and deny PRASA's petition for review.

It is so ordered.

[12/] The Board gave an alternative reason for upholding EPA's refusal to convene an evidentiary hearing, ruling that petitioner failed to show that its discharge did not currently "contribute to, increase, or perpetuate . . . stressed conditions." 40 C.F.R. § 125.61(f)(1) (1993). We need not pursue this point, for petitioner's failure to adduce hearing-worthy evidence on the future impacts prong is in itself enough to justify denying the instant petition for judicial review. We add in passing, however, that the record strongly suggests the correctness of the Board's conclusion on the current impacts prong as well.

APPENDIX B

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIROMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of:	)	
Mayaguez Regional Sewage Treatment Plant Puerto Rico Aqueduct and Sewer Authority	)	NPDES Appeal No. 92-23
Permit No. PROO23795	)	

ORDER DENYING RECONSIDERATION AND STAY PENDING RECONSIDERATION OR APPEAL

On September 7, 1993, the Puerto Rico Aqueduct and Sewer Authority (PRASA) filed a timely motion requesting that the Board reconsider its August 23, 1993 Order Denying Review in the abovecaptioned matter. Mayaguez also asks that the Board stay the effective date of the order pending reconsideration or (if the motion for reconsideration is denied) pending appeal to the United States Court of Appeals for the First Circuit. For the following reasons, Mayaguez's motion for reconsideration and for a stay pending reconsideration or judicial appeal is denied.

A. Motion For Reconsideration

Mayaguez contends that reconsideration is warranted for the following three reasons: 1) the Board erroneously departed from Agency regulations and its own precedents and created a new and unduly harsh standard for reviewing denials of evidentiary hearing requests; 2) by reviewing a document prepared by the U.S. Geological Survey (USGS) regarding the present contribution of PRASA's discharge to the existing marine environment, the Board usurped the function of the Regional Administrator; and 3) under the existing legal standard, PRASA has met its burden of setting forth a material issue of fact warranting an evidentiary hearing.

Under 40 C.F.R. § 124.91(i), motions for reconsideration "must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors." Such a motion will not be granted absent a showing that the Board has made a demonstrable error, such as a mistake of law or fact. *In re Hardin County, OH*, RCRA (3008) Appeal No. 92-1 (Feb. 4, 1993) (Order Denying Reconsideration). Upon review of PRASA's motion and the Region's response, we conclude that PRASA has failed to demonstrate that reconsideration of the Order Denying Review is warranted.

As the Board noted in its order Denying Review (at 3), publicly owned treatment works, such as the Mayaguez plant, must ordinarily meet secondary treatment requirements established under the § 301 of the Clean Water Act (CWA). *See* CWA § 301(b)(1)(B), 33 U.S.C.A. § 1311(b)(1)(B); 40 C.F.R. § 125.3(a)(1). Pursuant to procedures established in CWA § 301(h),

however, the Administrator may, under certain circumstances, issue an NPDES permit that modifies or relaxes the secondary treatment requirements of the Act. In particular, §301(h) allows for a modified permit, where the applicant can demonstrate that it satisfies each of nine criteria listed in CWA Sections 301(h)(1) through (h)(9). *Mayaguez,* at 3 n. 4 & 13. Under CWA §301(h)(2) and its implementing regulations, special rules apply if the marine environment surrounding the proposed outfall is already stressed by other discharges. In such cases, the applicant must demonstrate that its discharge des not or will not:

> (1) Contribute to, increase, or perpetuate such stressed conditions;
>
> (2) Contribute to further degradation of the biota or water quality if the level of human perturbation from other sources increases; and
>
> (3) Retard the recovery of the biota or water quality if the level of human perturbation from other sources decreases.

40 C.F.R. §125.61(f).

The Board decided that PRASA was not entitled to review of Region II's permit denial decision because PRASA had failed to show that it met all of the criteria necessary for issuance of a §301(h) permit. First, the Board held that PRASA had failed to present *any* evidence to show that its discharge would not retard recovery of the biota if existing sources of pollution were to decrease in the *future,* as required under § 125.61(f)(3). Second, the

Board concluded that PRASA had also failed to present *sufficient* evidence to show that its discharge would not contribute to *present* conditions, as required under § 125.61(f)(1).

Importantly, PRASA does not directly challenge the Board's conclusion that PRASA's failure to present any evidence on future effects, was, without more, an adequate reason for denying the §301(h) permit. Rather, PRASA argues in its reconsideration request that PRASA presented sufficient evidence on present effects to warrant a hearing on whether its discharge would contribute to the existing stressed marine environment.

Under 40 C.F.R. §124.75 the Regional Administrator is required to hold an evidentiary hearing where there are "material issues of fact relevant to the issuance of the permit." The Board interpreted § 124.75 to mean that the Regional Administrator in deciding an evidentiary hearing request must not only ensure that the facts in dispute are "material" to the outcome, but that resolution of those facts in favor of the applicant would result in an altered permit decision. The Board construed this to mean that the material facts specified in § 124.75 had to relate to a "genuine" issue affecting the outcome of the permit decision. *Mayaguez*, at 11-19. In interpreting this provision, the Board looked to Rule 56 of the Federal Rules of Civil Procedure for guidance. PRASA argues that the Board erred in looking to Rule 56 and that the "new" test announced in the decision is not consistent with the rules now governing evidentiary hearings. We disagree.

Whether PRASA was entitled to an evidentiary hearing turns on whether PRASA satisfied the requirements of §124.74. Section 124.74 requires that an evidentiary hearing request: "state each legal or factual question alleged to be at issue, and their relevance to the permit decision, * * * Information supporting the request * * shall be submitted as required by § 124.73 unless * * * already part of the Administrative record * * *." Thus, by its terms §124.74 contemplates that a hearing request will identify both the legal issue to be resolved and the factual information relied upon to support the legal outcome. Here, PRASA does not dispute that it did not present any evidence to support a finding that its discharge would not retard recovery if the level of pollution from other sources decreases, as required under § 125.61(f)(3). In these circumstances, the Regional Administrator reasonably concluded that PRASA could not satisfy the § 125.61(f)(3) criteria and thus a hearing was not necessary. In circumstances such as these, where no evidence is presented to support one of three mandatory permit preconditions, a Regional Administrator may properly conclude that an evidentiary hearing on issues pertaining to the other permit preconditions is not necessary or required, on the ground that the criteria for the permit modification ultimately cannot be met.

Thus, even if we were to assume for the sake of argument that the studies presented by PRASA raised a factual question regarding the extent to which the Mayaguez discharge is presently contributing to existing environmental stresses, we would still reach the same result. Without any evidence to support a finding under § 125.61(f)(3), PRASA was not entitled to an evidentiary hearing with respect to potential factual disputes regarding

§ 125.61(f)(1). We therefore see no reason to reconsider the merits of our August 23, 1993 Order Denying Review.[1/]

B. Stay Request

PRASA has also requested that the Board stay the effective date of the August 23rd order pending resolution of the motion for reconsideration or (if the motion is denied) pending an appeal to the United States Court of Appeals for the First Circuit. PRASA contends that without a stay it will suffer irreparable legal and financial harm because of its "financial and structural inability to comply immediately with secondary treatment requirements at Mayaguez." Affidavit of Emilio M. Colon, Executive Director, PRASA (September 2, 1993). PRASA's request for a stay is denied. Contrary to PRASA's assumptions, the Board's consideration of this matter did not serve to relieve PRASA of its obligation to comply with secondary treatment requirements under its existing 1987 NPDES permit.[2/] Rather, PRASA has been provided with relief from the secondary treatment requirements under the terms of a 1991 Order On Consent, EPA-CWAII-91-72. As part of that Order, PRASA has been required to comply with

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[1/] Because we are denying reconsideration on the grounds that PRASA did not meet the criteria for a § 301(h) permit based on PRASA's failure to submit any evidence to satisfy § 125.61(f)(3), we do not reach the question of whether the Board properly considered the United States Geological Survey Study regarding present impacts.

[2/] As noted in our August 23rd Order (p. 3 n.1) the Mayaguez plant received an NPDES permit in 1987 which includes secondary treatment standards.

certain interim limits which, in effect, modify the secondary treatment requirements in the 1987 permit. *See* Affidavit of Sandra Rocafort, Deputy Executive Director for compliance and Quality Assurance, PRASA (Sept. 27, 1993). Although the order expired on November 22, 1992, the Mayaguez facility apparently continues to operate under the interim limits set in the 1991 Order on Consent.

Neither PRASA's filing of a petition for review with the Board, nor the Board's Order Denying Review, directly affected PRASA's obligation to comply with the secondary treatment requirements of its 1987 NPDES permit.[3/] The extent of PRASA's obligations under its existing 1987 permit rests not with the Board but with the Agency's enforcement personnel. *See In re General Electric Co.*, RCRA Appeal No. 91-7 at 9 (EAB, Nov. 6, 1992). (The Board [in the permit appeal context] does not have responsibility for implementation of a validly issued permit.) For these reasons, PRASA's stay request pending appeal to the First Circuit is denied.

ENVIRONMENTAL APPEALS BOARD
By: _____
Nancy B. Firestone
Environmental Appeals Judge

Dated: December 12, 1993

[3/] We note that under the general rules governing permit stays, existing permit requirements remain in full force and effect pending the outcome of a permit modification request. *See* 40 C.F.R. §124.16(c). This provision does not expressly deal with permit modifications under § 301(h), but is consistent with our holding on PRASA's stay request.

APPENDIX C

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIROMENTAL
PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of:	)	
Mayaguez Regional Sewage Treatment Plant Puerto Rico Aqueduct and Sewer Authority	)	NPDES Appeal No. 92-23
Permit No. PROO23795	)	

1993 TSCA LEXIS 240
[Decided August 23, 1993]

ORDER DENYING REVIEW

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Syllabus

The Puerto Rico Aqueduct and Sewer Authority (PRASA) seeks review of the denial of an evidentiary hearing request on certain issues relating to Region II's denial of PRASA's application for a National Pollutant Discharge Elimination System (NPDES) permit under Section 301(h) of the Clean Water Act (CWA), 33 U.S.C.

§ 1311(h). PRASA applied for the § 301(h) permit in 1979 for its then proposed Mayaguez Regional Wastewater Treatment Plant, a Publicly Owned Treatment Works (POTW). The plant, located in Mayaguez, Puerto Rico, on the Western shore of the island, discharges into the Atlantic Ocean.

Under CWA § 301(h), the Administrator may, under certain circumstances, modify or relax the secondary treatment standards imposed under CWA § 301(b)(1)(B), 33 U.S.C. § 1311(b)(1)(B). In order to qualify for a § 301(h) permit, the applicant has the burden of demonstrating that it complies with each of the criteria set forth in CWA §§ 301(h)(1) - (h)(9) and the implementing regulations. The Region denied the permit, as well as PRASA's evidentiary request, on the grounds that PRASA failed to demonstrate compliance with CWA §§ 301(h)(1), (h)(2), and (h)(9). Under CWA § 301(h)(2), POTWs must demonstrate that the modified discharge will not interfere with the attainment or maintenance of that water quality which allows for recreational uses and assures protection of public water supplies and the protection and propagation of fish and wildlife. If, as here, the receiving waters are already stressed from sources other than the applicant's discharge, the applicant has the burden of demonstrating, by a preponderance of the evidence, that its modified discharge will not contribute to those stressed conditions, and will not retard recovery of the biota if the level of pollution from other sources decreases in the future. 40 C.F.R. § 125.61(f). Rather than making this demonstration, PRASA submitted evidence that shows the contribution from its discharge would be minimal or uncertain without more testing and analysis. The Region concluded that PRASA failed to meet its burden of

demonstrating that the discharge would not contribute to existing conditions, and that PRASA therefore failed to raise a genuine issue of material fact warranting an evidentiary hearing. This appeal followed.

Held: To support an evidentiary hearing request, the applicant must raise an issue of material fact. This issue must be a genuine one. In determining whether a factual dispute is "genuine," the Board adopts the standard articulated by the Supreme Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1985), with regard to motions for summary judgment. Under this standard, a party must present sufficient probative evidence in support of its position from which a reasonable decisionmaker could find in that party's favor under the applicable standard of proof.

Under CWA § 301(h)(2) and 40 C.F.R. § 125.61(f), PRASA has the burden of demonstrating, by a preponderance of the evidence, that its proposed modified discharge will not contribute to the already stressed conditions of the coral communities in the vicinity of the discharge and will not retard recovery if levels of pollution from other sources decrease in the future. The data submitted by PRASA in support of both its permit application and its evidentiary hearing request are insufficient to satify PRASA's burden. Thus, PRASA has not raised a genuine issue of material fact and the evidentiary hearing request was therefore properly denied. Accordingly, review of PRASA's petition is denied.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Firestone:

By petition dated August 25, 1992, the Puerto Rico Aqueduct and Sewer Authority (PRASA) seeks review of U.S. EPA Region II's denial of an evidentiary hearing request on certain issues concerning the Region's denial of PRASA's application for a National Pollutant Discharge Elimination System (NPDES) permit under Section § 301(h) of the Clean Water Act (CWA), 33 U.S.C. § 1311(h). At the request of the Environmental Appeals Board, the Region filed a response to the petition for review (Region's Response). In an Order dated October 26, 1992, the Board granted PRASA's request to supplement its petition to address additional issues raised in the Region's Response. PRASA filed a supplemental petition on December 15, 1992 (Supplemental Petition), and the Region filed a reply on February 19, 1993. The Environmental Appeals Board has jurisdiction to grant or deny this petition for review under 40 C.F.R. §§ 124.72 & 124.91. *See* 40 C.F.R. § 125.59(g)(5) ("Appeals of section 301(h) determinations shall be governed by the procedures in 40 CFR part 124."). For the reasons set forth below, the petition for review is denied.

I. Background

On September 12, 1979, PRASA applied for an NPDES permit modifying the secondary treatment requirements of the Act for its then proposed Mayaguez Regional Wastewater Treatment Plant, a Publicly Owned Treatment

Works (POTW).[1/] The plant, located in Mayaguez, Puerto Rico, on the Western shore of the island, discharges into the Atlantic Ocean. Ordinarily, POTWs are required, under CWA § 301(b)(1)(B), 33 U.S.C. § 1311(b)(1)(B), to meet secondary treatment standards established under the Act.[2/] However, PRASA sought a modification of the secondary treatment requirements under the procedure established in CWA § 301(h).[3/] *See* Petition for Review, at 2. In general, CWA § 301(h)

[1/] The Mayaguez plant was issued an NPDES permit on September 30, 1987, containing secondary treatment requirements, and began operating in December of 1987. Although the permit expired on November 29, 1992, PRASA filed a timely application for renewal and therefore continues to operate under the terms of the 1987 permit until the Region acts on the renewal application. *See* 40 C.F.R. § 122.6.

[2/] Under 40 C.F.R. § 125.3(a)(1), which implements CWA § 301(b), all permits for POTWs must contain effluent limitations based upon secondary treatment from the date of permit issuance.

[3/] CWA § 301(h) applies to discharges from POTWs into marine waters. This section defines "discharge into marine waters" as:

> [A] discharge into deep waters of the territorial sea or the waters of the contiguous zone, or into saline estuarine waters where there is strong tidal movement and other hydrological and geological characteristics which the Administrator determines necessary to allow compliance with paragraph (2) of this subsection, and section 1251(a)(2) of this title.

The Atlantic Ocean is a marine water within the meaning of this section.

provides that the Administrator, with the concurrence of the State, may, under certain circumstances,[4/] issue an NPDES permit that modifies or relaxes the secondary treatment requirements of the Act.[5/] POTWs receiving § 301(h) modifications must at a minimum perform primary treatment and, among other things, demonstrate that the modified discharge will not interfere with the attainment or maintenance of that water quality which allows for recreational uses and assures protection of public water

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[4/] The Act requires that the applicant satisfy each of nine criteria. In summary, these criteria, which are implemented through 40 C.F.R. Part 125, Subpart G, require the applicant to demonstrate that: (1) there are applicable water quality standards for those pollutants for which the modification is sought and the applicant complies with such standards; (2) the discharge will not interfere (alone or in combination with pollutants from other sources) with the attainment or maintenance of a balanced indigenous population of marine life, or with the attainment or maintenance of that water quality which assures protection of public water supplies and recreational activities; (3) the applicant has established a system for monitoring the impact of the modified discharge on marine life; (4) the modified requirements will not result in any additional requirements on any other point or nonpoint source; (5) all applicable pretreatment requirements will be enforced; (6) certain pretreatment requirements for toxic pollutants are met; (7) the applicant has established a schedule of activities to eliminate the introduction of toxic pollutants from non-industrial sources; (8) there will be no new or substantially increased discharge of the pollutant to which the modification applies beyond that specified in the permit; and (9) the proposed modified discharge will receive at least primary or equivalent treatment and also meets the toxicity criteria established under CWA § 304(a)(1).

[5/] The Agency defines secondary treatment in terms of three parameters: biochemical oxygen demand, suspended solids, and pH. *See* 40 C.F.R. § 133.102.

supplies and the protection and propagation of fish and wildlife. *See* CWA § 301(h)(2); 40 C.F.R. § 125.61.

Region II tentatively denied PRASA's § 301(h) permit application on February 6, 1984, on the grounds that the Commonwealth of Puerto Rico had not concurred in the permit under the procedure of 40 C.F.R. §§ 125.60(b)(2) and 124.54. *See* Letter from Jacqueline E. Schafer, Regional Administrator, to Carlos Mulero, Executive Director, PRASA (Feb. 6, 1984) (Exh. 6 to Region's Response). Under these procedures, States must certify that a modified discharge will comply with all applicable State water quality standards.[9/] The Region also concluded that Puerto Rico had failed to issue a positive determination that the modified discharge would not result in additional treatment requirements for other point sources, pursuant to 40 C.F.R. § 125.63. *Id.*

Thereafter, in February and June of 1985, PRASA submitted a revised § 301(h) application along with supplemental information prepared for PRASA by the engineering firm of Metcalf & Eddy to support its assertion that the modified discharge would in fact meet the § 301(h) waiver requirements. Following a review of this new information, the Region once again issued a tentative denial on July 17, 1986, on the grounds that PRASA's proposed modification would not satisfy the § 301(h) modification requirements. In particular, the Region identified the following deficiencies: (1) PRASA had failed to demonstrate that dilution at the outfall would

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[9/] Puerto Rico subsequently certified that the proposed 301(h) permit would comply with State law on February 5, 1985.

ensure compliance with the Commonwealth's water quality standards for chlordane or the Agency's saltwater criteria for chlordane or mercury; (2) PRASA had failed to demonstrate the proposed discharge would not contribute to already stressed conditions in the vicinity of the proposed discharge; (3) PRASA had failed to thoroughly characterize several components of the biota or present a comparative demonstration of the effects of the existing and modified discharge; and (4) PRASA had failed to implement a pretreatment program. *See* Letter from Christopher J. Daggett, Regional Administrator, to Arturo Valldejuly, Executive Director, PRASA (July 17, 1986) (Exh. 7 to Region's Response).

On October 10, 1986, the Region, in accordance with the procedures established in 40 C.F.R. § 124.10 and § 124.14 issued a public notice and solicited comments on the application and its tentative decision. At PRASA's request, a public hearing was held on April 28-29, 1987, and comments were taken until May 15, 1987. In April of 1987, PRASA filed an additional report prepared by Metcalf & Eddy (M & E Study).[7/] The M & E Study

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[7/] Following submission of the 1987 M & E Study, the Region contracted with the firm of Tetra Tech, Inc. to conduct a technical review of that Study. Tetra Tech produced a report in August of 1990, entitled: *Technical Review of the 1987 Information Supplement of the Mayaguez Regional Wastewater Treatment Plant (Puerto Rico) Section 301(h) Application for Modification of Secondary Treatment Requirements for Discharge into Marine Waters* (hereinafter Tetra Tech Report). (Exh. 1 to Region's Response to PRASA's Supplemental Petition). PRASA argues that because the Region did not list this Report in the certified index to the administrative record submitted along with the Region's response to PRASA's petition for

(continued...)

presented additional information concerning, *inter alia*, the condition of the water surrounding the proposed discharge and the potential impact if the § 301(h) permit application were granted. The Study concluded that although the coral communities in the vicinity of the modified discharge were already stressed due to heavy sediment loadings, the addition of 850 tons annually from PRASA's modified discharge would not have a measurable effect on the surrounding coral communities when compared to the contributions from the Rio de Anasco. M & E Study at 4-24 -4-27. This additional sediment, the Study states, "will account for slightly more than one percent of sediment loading." *Id.* at 4-18.

7/(...continued)
review, the Report is not part of the administrative record in this proceeding. Supplemental Petition, at 2-3. Thus, according to PRASA, the Board must strike any of Region II's findings or conclusions that are based on this report. *Id.* We disagree. The Report was cited on page 32 of the Region's response to comments (see Exh. 8 to Region II's Response) and therefore became part of the administrative record. *See* 40 C.F.R. § 124.17(b) ("any documents cited in the response to comments shall be included in the administrative record for the final permit decision * * *."). *See also* 40 C.F.R. § 124.18(e) (material readily available at the issuing Regional office need not be physically included in the same file as the rest of the record as long as it is referred to in the response to comments). Although, as the Region acknowledges, it would have been clearer if the Region had listed the Tetra Tech Report in the certified index (Region's Response to Supplemental Petition at 4 n.4), PRASA was aware of the report and, in fact, requested and received a copy of it approximately six weeks before requesting an evidentiary hearing. (*See* Exh. 8 to Region's Response to Supplemental Petition). Indeed, PRASA has shown no prejudice whatsoever from Region II's failure to list the report in the certified index.

The Region issued a final decision denying PRASA's § 301(h) application on December 13, 1991, on the grounds that PRASA failed to meet the requirements of CWA §§ 301(h)(1), (h)(2), and (h)(9) and the implementing regulations.[8/] PRASA filed a request for an evidentiary hearing on February 26, 1992, in which it contested the Region's factual and legal basis for denying the § 301(h) permit. See Exh. 3 to Region's Response. As an attachment to its hearing request, PRASA submitted a 1992 report prepared by the U.S. Geologic Survey entitled "Assessment of the Biota, Sediments, and Water Quality Near the Discharge of Primary Treated Effluent from the Mayaguez Regional Wastewater Treatment Plant: Bahia de Anasco, Puerto Rico: December 1990 - January 1991" (Exh. 4 to Region's Response) (hereinafter "1992 Report"). According to PRASA, this report supports its contention that the plant satisfies the § 301(h) requirements for a relaxation of the secondary treatment standards.[9/]

[8/] *See supra* n.4; 40 C.F.R. Part 125, Subpart G.

[9/] Although the Region reviewed the 1992 Report, it contends that it was not obligated to do so because the Report was submitted after May 15, 1987 (the close of the comment period). We disagree. As the Region correctly notes, in publicly noticing its tentative decision to deny PRASA's § 301(h) permit application, the Region invoked the provisions of 40 C.F.R. § 124.14(a)(1) (Reopening of the public comment period). In such cases, parties are required to submit all reasonably available factual grounds supporting their position, including all supporting materials, by the close of the comment period. Under 40 C.F.R. § 124.76, where the Region elects to apply the requirements of § 124.14(a), any supporting information that was not submitted to the administrative record by the close of the comment period, may not be submitted as part of an evidentiary hearing request

(continued...)

Appendix 3 to this report[10/] states, in pertinent part, that the hypothesis that the plant's discharge may be causing additional harm to the coral reefs has been neither proved nor disproved, and that further study is needed because of the presence of pollution from other sources. Appendix 3 to 1992 Report, at 11.

9/(...continued)
except for good cause. Good cause exists where information could not reasonably have been made available earlier. 40 C.F.R. § 124.76. In the present case, the studies on which the 1992 Report is based were conducted after the plant began operating in December of 1987. Thus, because the information in the Report (an assessment of the impact from the actual operation of the plant) could not have been reasonably ascertained or made available by the close of the comment period, good cause existed for failing to submit the information earlier.

We note that in cases where the provisions of § 124.14 are not invoked, parties may submit additional factual information in support of an evidentiary hearing request even if that information was available during the comment period but had not been previously submitted to the administrative record. *See* 49 Fed. Reg. 38,042 (Sept. 26, 1984) (supporting information need not be submitted to the administrative record during the comment period); 40 C.F.R. § 124.74(b)(1) (parties requesting an evidentiary hearing must submit information supporting the request unless the information is already part of the administrative record); *In re Boise Cascade Corp.*, NPDES Appeal No. 91-20, at 10 (EAB, Jan. 15, 1993) (holding that the Region may not deny an evidentiary hearing request on the ground that substantiating data was not submitted during the comment period).

10/ Appendix 3 is entitled: *Coral Diversity and Cover in Reefs off Mayaguez Bay: Relation to the Mayaguez Sewage Treatment Plant Outfall*, Report submitted to the U.S. Geological Survey, Carlos Goenaga, Dept. Biology, RUM, Mayaguez, PR, April, 1991.

The Region denied PRASA's evidentiary hearing request on July 23, 1992. *See* Exh. 2 to Region's Response. In its denial, the Region relied primarily on PRASA's failure to submit sufficient evidence to raise a material issue of fact with regard to PRASA's compliance with the requirements of CWA § 301(h)(2) and its implementing regulations. Under the regulations implementing CWA § 301(h)(2), where the marine environment surrounding the proposed outfall is already stressed from sources other than the applicant's discharge, the applicant has the burden of demonstrating, to the satisfaction of the Administrator, that its discharge *does not or will not*:

> (1) Contribute to, increase, or perpetuate such stressed conditions;
>
> (2) Contribute to further degradation of the biota or water quality if the level [*18] of human perturbation from other sources increases; and
>
> (3) Retard the recovery of the biota or water quality if the level of human perturbation from other sources decreases.

40 C.F.R. § 125.61(f) (emphasis added). The Region concluded that PRASA failed to present sufficient evidence to allow a reasonable finder of fact to conclude that PRASA had satisfied these criteria. In particular, the Region explained that because the waters surrounding the outfall are undeniably stressed, PRASA has the burden of demonstrating that its modified discharge will meet the requirements listed above. PRASA instead presented evidence by both its own contractor and the U.S.

Geological Survey that shows that the additional impact of the modified discharge on the surrounding coral communities would be minimal or uncertain when compared to existing sediment loadings. However, because the regulations indicate that there can be *no* contribution to existing stressed conditions, and because PRASA concedes that it will contribute 850 tons per year of additional sediment, the Region concluded PRASA could not prevail as a matter of law, and therefore there was no basis for an evidentiary hearing.[11/] This appeal followed.

According to PRASA, it did indeed raise a material issue of fact regarding its compliance with CWA § 301(h)(2) and 40 C.F.R. § 125.61(f). Specifically, PRASA argues that the data submitted in support of its waiver application, including the 1987 M & E Study and the 1992 Report, demonstrate that it will satisfy the

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[11/] In its denial, the Region stated, in part:

> The applicant failed to address the issue of stressed waters. PRASA's failure to adduce evidence in the nature of a stressed waters demonstration, on the issue of whether the proposed modified discharge will interfere with the protection and propagation of a [balanced indigenous population] fails to raise a genuine issue of material fact as to this issue. PRASA has not demonstrated, to the satisfaction of the Administrator, that its proposed modified discharge will assure compliance with sub-section 301(h)(2) of the Act, with regard to non-interference with the balanced indigenous population in stressed waters.

Denial of Evidentiary Hearing Request, at 3 (Exh. 2 to Region's Response).

stressed water demonstration required by section 125.61(f). PRASA does not dispute that the coral communities in the vicinity of the discharge are stressed due to heavy sediment loadings. *See* Petition for Review, at 10-11. Nor does PRASA contest that, because of these already stressed conditions, it must make the demonstration required by 40 C.F.R. § 125.61(f). *Id.* Rather, PRASA contends that the effect of its discharge presents a factual issue which should be resolved in an evidentiary hearing.[12/] For the following reasons, we conclude that the Region properly denied the evidentiary hearing request with respect to PRASA's compliance with CWA § 301(h)(2) and the implementing regulations, and we therefore deny review.[13/]

II. Discussion

Under the rules governing an NPDES proceeding, there is no appeal as of right from the Regional Administrator's decision. *In re Miners Advocacy Council*, NPDES Appeal No. 91-23, at 3 (EAB, May 29, 1992). Ordinarily a petition for review is not granted unless the Regional Administrator's decision is clearly erroneous or involves an exercise of discretion or policy that is important and

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[12/] PRASA also argues that the Region erroneously concluded that PRASA failed to satisfy the requirements of CWA §§ 301(h)(1) and (h)(9).

[13/] As discussed above, an applicant for a § 301(h) modified permit must demonstrate that it satisfies all requirements of the Act. Because PRASA did not meet its burden of demonstrating compliance with § 301(h)(2), we do not reach the issue of whether or not PRASA met the requirements of §§ 301(h)(1) and (h)(9).

should therefore be reviewed by the Environmental Appeals Board.[14] *See, e.g., In re City of Jacksonville, District II Wastewater Treatment Plant*, NPDES Appeal No. 91-19 (EAB, August 4, 1992). The petitioner has the burden of demonstrating that review should be granted. *See* 40 C.F.R. § 124.91(a). In determining whether PRASA has met this burden, we will first focus on whether PRASA has met the requirements of CWA § 301(h)(2).

A. Compliance with CWA § 301(b)(2)

Under the regulations, a party requesting an evidentiary hearing must raise a material issue of fact relevant to the issuance of the permit. See 40 C.F.R. §§ 124.74(b)(1) and 124.75(a)(1).[15] We construe this to mean that the

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[14] With respect to appeals under Part 124 regarding NPDES permits, Agency policy is that most permits should be finally adjudicated at the Regional level. 44 Fed. Reg. 32,887 (June 7, 1979). While the Board has broad power to review decisions in NPDES permit cases, the Agency intended this power to be exercised "only sparingly." *Id.*

[15] 40 C.F.R. § 124.74(b)(1) provides that requests for evidentiary hearings must:

> state each legal or factual question alleged to be at issue, and their relevance to the permit decision, together with a designation of the specific factual areas to be adjudicated * * *. Information supporting the request or other written documents relied upon to support the request shall be submitted as required by § 124.73 unless they are already part of the administrative record required by § 124.18.

Under 40 C.F.R. § 124.75(a)(1):

(continued...)

RA must ensure that there is a *genuine* issue of material fact.[16/] This requirement is very similar to the requirement set forth in Rule 56 of the Federal Rules of Civil Procedure regarding summary judgment.[17/] Rule 56 provides that summary judgment:

> shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and

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15/(...continued)

> the Regional Administrator shall decide the extent to which, if at all, the request shall be granted, provided that the request conforms to the requirements of § 124.74, and sets forth material issues of fact relevant to the issuance of the permit.

16/ *See In re Miami-Dade Water and Sewer Authority Department*, NPDES Appeal No. 91-14, at 17 (July 27, 1992); *In re City of Jacksonville, District II Wastewater Treatment Plant*, NPDES Appeal No. 91-19, at 2 (August 4, 1992).

We note that under 40 C.F.R. § 124.84 any party to an evidentiary hearing has the right to move for summary determination on the basis that there is no genuine issue of material fact for determination. Today's decision does not affect this right. That is, where the Region concludes that there is a need for an evidentiary hearing on a material issue of fact, summary disposition may still be appropriate. For example, in the present context, if PRASA had presented sufficient facts to warrant an evidentiary hearing, and the Region failed to present any relevant evidence to rebut PRASA's evidence, PRASA would be free to request that the Presiding Officer decide any or all issues by summary determination.

17/ Although the Federal Rules do not apply to these proceedings, we have, in certain circumstances, relied on these rules for guidance. *See In re Wego Chemical & Mineral Corporation*, TSCA Appeal No. 92-4, at 13-14 & n.10 (EAB, Feb. 24, 1993).

> admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

We think that the standard established under Rule 56 provides useful guidance for the Board in evaluating whether the Region must grant an evidentiary hearing.

In construing Rule 56, the Supreme Court has explained that in order to defeat a motion for summary judgment, a party must demonstrate that an issue is both "material" and "genuine." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1985). A factual dispute is material where, under the governing law, it might affect the outcome of the proceeding. The issue here -- whether PRASA has satisfied the requirements of CWA § 301(h)(2) and 40 C.F.R. § 125.61(f) -- is material. Thus, the only question we must resolve is whether PRASA has raised a "genuine" issue.

A factual dispute is genuine if the evidence is such that a reasonable finder of fact could return a verdict in either party's favor. *Id.* If so, summary judgment is inappropriate and the issue must be resolved by a finder of fact. If, on the other hand, the evidence, viewed in a light most favorable to the non-moving party, is such that no reasonable decisionmaker could find for the nonmoving party, summary judgment is appropriate. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970); 6 J. Moore's Federal Practice ¶ 56.15[1] (stating that summary judgment is appropriate when a party is entitled to judgment as a matter of law). In such a case, Rule 56 provides a mechanism for avoiding the unnecessary delay

and expense of a full blown trial. 6 J. Moore's Federal Practice ¶ 56.04[1].

Under Rule 56, the determination of whether or not summary judgment is appropriate also implicates the substantive evidentiary standard of proof in a particular proceeding. *Anderson, supra*, at 252. That is, in deciding whether a genuine factual issue exists, the judge must consider whether the quantum and quality evidence is such that a finder of fact could reasonably find for the party producing that evidence under the applicable standard of proof. As the Court explained:

> Whether a jury could reasonably find for either party * * * cannot be defined except by the criteria governing what evidence would enable the jury to find for either the plaintiff or the defendant: It makes no sense to say that a jury could reasonably find for either party without some benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are in fact provided by applicable evidentiary standards.

Id. at 254-55. Thus, in determining whether a genuine issue exists, a judge must decide whether a finder of fact, applying the applicable evidentiary standard, could reasonably find for either party. *Id.* at 255; *see also First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-90 (1968).

Because the inquiry in the present context, *i.e.*, whether a party has raised a genuine issue of material fact, is for our purposes virtually identical to that in the summary

judgment context, we believe that the standard articulated by the Supreme Court in *Anderson* should be applied in the context of evidentiary hearing requests as well. Thus, in the context of an evidentiary hearing request, a genuine issue of material fact exists only if a party requesting an evidentiary hearing presents sufficient probative evidence from which a reasonable decisionmaker could find in that party's favor by a preponderance of the evidence.[18/] For the reasons stated below, we conclude that the PRASA has failed to meet this standard and thus its burden with respect to its evidentiary hearing request.

In order to receive a permit under CWA § 301(h), an applicant has the burden of demonstrating by a preponderance of the evidence that it meets each of the criteria listed in CWA sections 301(h)(1) through (h)(9) and the implementing regulations. *See* 40 C.F.R. § 125.60(g). Section 301(h)(2) of the Clean Water Act authorizes the Administrator to issue a permit modifying the secondary treatment requirements imposed under CWA § 301(b)(1)(B) if the applicant demonstrates that:

> [T]he discharge of pollutants in accordance with such modified requirements will not interfere, alone

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[18/] Although the Act does not specify a standard of proof against which the Agency must review the evidence presented in support of the modified permit application, the traditional standard of proof for informal Agency proceedings (such as a permit determination) is a "preponderance of the evidence." *See In re Penzoil Exploration and Production Company*, UIC Appeal No. 88-1, at 13 (CJO, Nov. 19, 1990). This standard of proof is also applicable to NPDES evidentiary hearings. *In re City of Fayetteville, Arkansas*, NPDES Appeal No. 88-1, at 7 (CJO, Dec. 22, 1988).

> or in combination with pollutants from other sources, with the attainment or maintenance of that water quality which assures protection of public water supplies and the protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife, and allows recreational activities, in and on the water[.]

Where, as here, receiving waters are already stressed due to pollution from sources other than the applicant's discharge, the applicant has the burden of demonstrating, among other things, that it will not contribute to, increase, or perpetuate such stressed conditions, and will not retard recovery of the biota if levels of pollution from other sources decrease in the future. 40 C.F.R. 125.61(f). In the 1979 preamble to Part 125 Subpart G, the Agency made clear that it would be difficult to meet this burden.[19/] The preamble states:

> As a practical matter, it will be extremely difficult for most applicants discharging into stressed waters to demonstrate that their discharge will meet the requirements of section 125.61. As a factual matter, the discharge of additional pollutants into an already polluted marine environment virtually always

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19/ We note that portions of the regulations implementing CWA § 301(h) promulgated in 1979 were invalidated by the United States Court of Appeals for the District of Columbia Circuit in 1981. *See Natural Resources Defense Council, Inc. v. E.P.A.*, 656 F.2d 768 (D.C. Cir. 1981). The Agency promulgated final amendments to the regulations implementing section 301(h) in 1982. 47 Fed. Reg. 53,666 (November 26, 1982). The language of the stressed waters demonstration, however, has remained virtually unchanged.

> increases or contributes to adverse impact; it is extremely difficult, as a practical matter, to demonstrate that it does not.

44 Fed. Reg. 34,806 (June 15, 1979). According to the preamble, in order to make this demonstration, the applicant must:

> (1) document the difference between the marine communities that currently exist in the vicinity of its outfall and the balanced, indigenous population that would exist in the absence of all sources of pollution; (2) demonstrate that its discharge is not contributing to the present biological degradation associated with stressed waters by comparing the marine populations at the outfall site with those at a similarly stressed control site (absent its discharge); and (3) demonstrate that its discharge will not contribute to further degradation of the biota if the level of pollution from other sources increases, and will not retard the recovery of the biota if the level of pollution from other sources decreases. This latter showing, which requires a predictive analysis of biological responses to future pollution, is so difficult that EPA is unable to provide a specific guidance or suggested analytical procedures for making this demonstration.

Id. In the present case, the data submitted by PRASA fail to satisfy the requirements of § 125.61(f).

PRASA does not dispute that the coral reefs surrounding the outfall are already stressed due to heavy sediment loadings. Rather, the dispute concerns the

impact the modified discharge will have on these conditions. According to PRASA, this impact will be insignificant compared to the total sediment loadings from the Rio de Anasco. In this regard, the 1987 M & E Study states that out of a total sediment loading of 65,000 tons per year, "the proposed discharge of primary treated effluent will contribute approximately 850 tons per year * * *." M & E Study at 4-24. The Study concludes that this amount of sediment will have no measurable effect on current conditions when compared to existing sediment loadings. *Id.*

As stated above, a discharger into already stressed waters must demonstrate, among other things, that its modified discharge would not retard recovery of the biota if existing sources of pollution were to decrease *in the future*. 40 C.F.R. § 125.61(f)(3). The studies submitted by PRASA do not even purport to make such a finding. Rather, the studies focus on the relative present contribution of the discharge when compared to total sediment loadings.[20/] While PRASA's relative

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[20/] We note that Chapter 4 of the 1987 M & E Study states:

> It is unlikely that intensive agricultural practices on the steep hills of the Rio de Anasco basin that have continued for over three centuries will be terminated or even inhibited, since agriculture continues to be one of the main features of the rural Puerto Rican economy. Consequently, the continued erosion and sedimentation events, * * * will continue to contribute very large and significant quantities of sediments and nutrients into the Bahia de Anasco and thus limit any theoretical development of the coral communities.

(continued...)

contribution may be small at the present time compared to other sediment sources, it does not follow that PRASA's discharge will not retard recovery in the future if these other sources decrease. In such a situation, PRASA's contribution may indeed retard the speed of any recovery. Because the data submitted by PRASA do not attempt to address this issue, PRASA has failed to make the demonstration required under the regulation and has thus failed to present a genuine issue for a hearing. Failure to provide any analysis on future impacts was sufficient for the Region to deny the § 301(h) permit.

We note, further, that PRASA's attempt to create a genuine issue of material fact with regard to its *present* contribution also fails to meet the demonstration required under 40 C.F.R. § 125.61(f)(1). While PRASA's contribution to existing stresses may be small compared to input from the Rio de Anasco, the facts proffered by PRASA in the 1987 M & E Study fail to demonstrate that 850 tons per year of additional pollutants will not contribute to existing conditions. As the Region has noted, although PRASA's discharge may not be sufficient, in and of itself, to significantly impact the coral reefs if other stresses did not exist, this is not the showing required by the regulations. *See* Response to Comments, at 14 (Exh. 8 to Region's Response). Rather, PRASA must demonstrate

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20/(...continued)
M & E Study, at 4-26. Although a decrease in pollution from human perturbations other than PRASA's discharge may be unlikely, the regulations require that PRASA demonstrate that its discharge will not retard recovery if such a decrease should occur in the future. PRASA has therefore failed to make the demonstration required under § 125.61(f)(3).

by a preponderance of the evidence that it will not contribute to existing stresses. PRASA has not proffered sufficient facts to allow a reasonable decision maker to find in its favor in this regard.

The 1992 Report, prepared by the United States Geological Survey (USGS), confirms our analysis. Contrary to PRASA's contentions, the USGS Report does not demonstrate that the modified discharge will not contribute to present conditions. This report, submitted in support of PRASA's evidentiary hearing request, assesses the impact of the actual operation of the plant on the surrounding marine environment. Appendix 3 to this report states, in part:

> [C]oral cover, gorgonian density and other parameters were lower in the stations closest to the outfall; therefore, the hypothesis that there is an effect by the sewage outfall on the coral reef benthic environment is supported or, at least, it is not invalidated. The available evidence, however, does not prove the hypothesis of damage by the outfall either, mainly because of the presence of other pollution sources. Further detailed work with additional stations is needed to assess the hypothesis of damage by the outfall.

Coral Diversity and Cover in Reefs off Mayaguez Bay: Relation to the Mayaguez Sewage Treatment Plant Outfall, Appendix 3 to 1992 Report, at 11. Thus, according to this report, further study would be needed to prove that PRASA's proposed discharge does or does not have an impact on existing conditions. Because neither of these studies demonstrate that PRASA's proposed discharge will

not contribute to presently existing stresses, there is no genuine issue of material fact warranting an evidentiary hearing.

We recognize that § 301(h) permit applicants face an extraordinary burden. However, this is consistent with the 1979 preamble to Part 125, Subpart G which indicates that it will be "extremely difficult" to meet these requirements. In fact, the Agency originally proposed to prohibit any modified discharges into marine waters that were already stressed. *See* 44 Fed. Reg. 34,806 (June 15, 1979). In response to comments, however, the Agency revised this section to allow such discharges if the applicant could make the stressed waters demonstration noted above.[21/]

[21/] We note that in *Arkansas v. Oklahoma*, 112 S.Ct. 1046, 1057-58 (1992), the Supreme Court rejected an interpretation of the Clean Water Act that would prohibit any discharges that "might" contribute to further degradation of waters already in violation of a State water quality standard. That case, however, involved the interpretation of an Oklahoma water quality standard prohibiting "degradation" of water quality. The Court agreed with the Agency that this standard should be interpreted to mean that the State requirement would only be violated if the discharge would cause an actual "detectable" violation of Oklahoma's water quality standards. *Id.* at 1052.

The case before us, however, does not involve the violation of a specific water quality standard. Rather, the regulation implementing CWA § 301(h)(2) requires that permit applicants seeking to discharge primary treated sewage into already stressed waters affirmatively show that they *will not contribute* in any way to existing environmental conditions rather than to the violation of a specific environmental standard. Importantly, the § 301(h) regulations, 40 C.F.R. § 125.61(f), specify the precise demonstration that must be made to satisfy this requirement. The showing that the applicant must make in

(continued...)

Thus, the requirement that applicants seeking § 301(h) permits make the demonstration noted above, reflects the Agency's great reluctance to grant § 301(h) waivers to facilities discharging into already stressed waters.[22/]

In this case, the data submitted by PRASA in support of its § 301(h) application is insufficient to satisfy the stressed waters demonstration required by 40 C.F.R. § 125.61(f). To support it hearing request, PRASA needed to allege facts demonstrating that the modified discharge would not retard recovery of the biota if the amount of pollution from other sources decreases in the future. In addition, it needed to show that the discharge would not contribute in any way to the already stressed condition of the coral reefs in the vicinity of the discharge. PRASA's reliance on studies indicating that the impact of the discharge is minimal as compared to other sources or at best uncertain, are insufficient to satisfy PRASA's burden. PRASA has therefore failed to raise a genuine factual issue warranting an evidentiary hearing.[23/] As the Supreme Court

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21/(...continued)
the present case is therefore very different from the showing identified in *Arkansas v. Oklahoma*.

22/ This is not to say that there is no case where discharges into stressed waters would be allowed. Where, for example, the receiving waters are stressed by pollutants other than those in the proposed discharge and such pollutants do not contribute to existing stresses, a § 301(h) permit may be appropriate.

23/ We note that although PRASA cites the Tetra Tech Report, *see supra* note 7, in support of its position that the modified discharge will not contribute to existing stresses on the surrounding coral

(continued...)

explained in *Anderson, supra*, 477 U.S. at 249, there is no genuine issue for a trier of fact where the party opposing summary judgment fails to adduce sufficient evidence to support a verdict in that party's favor. Accordingly, the Region properly concluded that PRASA failed to adduce facts sufficient to raise a genuine issue of material fact. The Region therefore properly denied the evidentiary hearing request.

B. Compliance with CWA §§ 301(b)(1) and (b)(9)

As additional grounds for denying the evidentiary hearing request, the Region concluded that PRASA failed to meet the requirements of CWA §§ 301(h)(1) and 301(h)(9). Under Section 301(h)(1) and 40 C.F.R. § 125.60, the applicant must demonstrate that there is an applicable water quality standard specific to the pollutants for which the modification is sought, and that the applicant complies with these standards. Section 301(h)(9) requires that the proposed modified discharge receive at least primary or equivalent treatment and also meet the toxicity criteria established under CWA § 304(a)(1). In its petition for review, PRASA raises numerous objections to the Region's analysis and conclusions with regard to these provisions. However, because we agree with the Region

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23/(...continued)
communities, *see* Supplemental Petition at 60 & n.169, that report, at best, indicates that the impact of the proposed discharge on the surrounding coral reefs will be uncertain. The report concludes that "based on the limited data available for review and the conservative assumptions used, it appears that nutrient concentrations in the proposed discharge may contribute to stresses currently experienced at the coral reefs." Tetra Tech Report, at 25 (emphasis added).

that PRASA failed to meet its burden of demonstrating that the proposed modified discharge would satisfy the requirements of CWA § 301(h)(2) and 40 C.F.R. § 125.61, we do not reach these issues.

Information submitted by a person requesting an evidentiary hearing under 40 C.F.R. § 124.74 must raise a genuine issue of material fact. In determining whether a genuine issue has been raised, the Board adopts the standard articulated by the Supreme Court in *Anderson v. Liberty Lobby*, *supra*, with regard to motions for summary judgment. Under this standard, to demonstrate the existence of a genuine issue of material fact, a person requesting an evidentiary hearing must present sufficient probative evidence in support of its positions from which a reasonable decisionmaker could rule in that person's favor under the applicable standard of proof. PRASA has failed to meet this standard with respect to at least one of the criteria necessary to support the issuance of a permit under CWA § 301(h).

Under CWA § 301(h)(2) and 40 C.F.R. § 125.61(f), PRASA has the burden of demonstrating, by a preponderance of the evidence, that its proposed modified discharge will not retard the recovery of the biota if the level of pollution from other sources decreases in the future. In addition, it must demonstrate that it will not contribute to the already stressed conditions of the coral communities in the vicinity of the discharge. At best, however, the data submitted by PRASA in support of its § 301(h) waiver application indicate that when compared to existing sediment loadings from the Rio de Anasco, sediment from the modified discharge will be minimal or uncertain. However, these data are insufficient to

demonstrate that if existing levels of sediment were to decrease, PRASA's contribution would not retard recovery of the biota. In addition, PRASA has failed to demonstrate that its discharge would not contribute to existing conditions. PRASA has therefore failed to raise a genuine issue of material fact warranting an evidentiary hearing. That is, PRASA failed to present sufficient evidence from which a reasonable decisionmaker could decide in its favor. The evidentiary hearing request was therefore properly denied. Accordingly, review is denied.[24/]

So ordered.

[24/] In the supplement to its petition for review, PRASA contends that because the full administrative record was only available at Region II's headquarters in New York, and because of the high cost of traveling to New York, PRASA was hindered in its ability to exercise its right of appeal. PRASA's Supplemental Petition, at 61-62. PRASA, however, provides no support for this assertion. While PRASA may have incurred certain costs in arranging travel to New York, it has failed to present any evidence that such costs prevented it from obtaining any portion of the administrative record. In addition, there is no indication in the record on appeal that PRASA was hindered in any significant way from exercising its appellate rights. PRASA's argument in this regard is therefore rejected.

APPENDIX D

Assessment of the Biota, Sediments, and Water Quality Near the Discharge of Primary Treated Effluent from the Mayagüez Regional Wastewater Treatment Plant: Bahía de Añasco, Puerto Rico: December 1990 - January 1991

DRAFT DATA REPORT

Richard M. T. Webb,[1/] Paul D. Collar,[2/]
William C. Schwab,[3/] and Carlos Goenaga[3/]

This report is preliminary and has not been reviewed for conformity with the U.S. Geological Survey editorial standards or with the North American Stratigraphic Code. Any use of trade, product, or firm names is for descriptive purposes only and does not imply endorsement by the U.S. Government. Appendices to this document present the analytical results and interpretations by contracted parties. The appendices to this report present the results of biological studies and analytical rsults of water quality; any interpretations of the data are those of the contracted parties and do not necessarily represent the official position of the U.S. Government.

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Assessment of the Biota, Sediments and Water Quality Near the Discharge of Primary Treated Effluent from the Mayagüez Regional Wastewater Treatment Plant: Bahía de Añasco, Puerto Rico: December 1990 - January 1991

by

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ABSTRACT

The Mayagüez Regional Wastewater Treatment Plant has been discharging primary treated effluent into the Bahía de Añasco since 1987. A multidisciplinary study of the bay was conducted during December 1990 and January 1991 to assess changes in the marine environment resulting from the discharge. Evidence of impact on the marine environment by the outfall was not observed in side-scan sonar imagery, the distribution and diversity ofthe marine biota, nor in the composition of the sediments in the bay. Waters sampled at the limit of the zone of initial dilution in the bay met the United States Environmental Protection Agency (EPA) criteria for marine acute and chronic exposure in addition to the EPA standards for marine waters where organisms may be harvested for consumption. Water quality also met all Puerto Rico Environmental Quality Board standards.

The diffuser is located in 11 meters of water about 1700 meters offshore. The immediate area around the outfall is characterized by muddy sediments deposited on an irregular bedrock surface. A high-resolution sidescan-sonar image clearly defined the outfall's position relative to the coral reefs and unconsolidated sediments deposited in the bay. Seismic reflection lines reveal reeflike structures buried underneath the fine sediments deposited between the shelf-edge reefs and shore.

The physical environment and biota in the Bahía de Añasco, including the area around the outfall, continue to evolve in response to sediments, contaminants, and nutrients discharged from the rivers and other industrial point-sources discharging directly into the Bahía de Mayagüez and other waters influencing the Bahía de Añasco. Hard bottom communities in the interior parts of the bay, including two sites reported here, show signs of being stressed by sediments and nutrient loads discharged by the Río Grande de Añasco and other point sources in the Bahía de Mayagüez. However, data collected during this study does not implicate the outfall as a stressor. Balanced indigenous populations were documented in the soft-bottom communities at 8 sites in the bay, including a site in the initial mixing zone of the outfall. Significantly, the growth rate of the star coral *Montastrea annularis*, located only 610 meters from the south leg of the diffuser, has not decreased since the outfall became operational. Instead, the community has shown a continuous recovery from a bleaching event that affected the region in 1987-88. Coverage and diversity of hard corals surveyed at two previously studied sites located in the reefs Manchas

Interiores and Manchas Exteriores, showed no significant differences between 1985 and 1990.

INTRODUCTION

In January 1991, water quality was analyzed for the Mayagüez Regional Wastewater Treatment Plant (MRWTP) waste stream, the Río Grande de Añasco, the Río Yagüez, and the marine waters off the west coast. The results are presented here along with an analysis of the sediments and biota of the Bahía de Añasco in order to document the impact of the MRWTP ocean outfall discharge on the marine environment. The MRWTP is one of 10 large regional facilities recently built by the Puerto Rico Aqueduct and Sewer Authority (PRASA) to accept and treat large volumes of point-source discharges. The Plant was designed to treat a maximum of 21 million gallons of per day (Mgal/d) of wastewater before discharging it into the Bahía de Añasco through an outfall located 1700 m offshore of the town of Maní (fig. 1).

Section 301(b)(1)(B) of the Clean Water Act (the Act), 33 U.S.C. Section 1311(b)(1)(B) enforced by the Environmental Protection Agency (EPA) required that all publicly owned treatment works in existence on July 1, 1977 were required to meet effluent limitations based upon secondary treatment (biochemical oxygen demand, suspended solids, and Ph) (EPA, 1986). Section 301(h), which amended the Act in 1981, provides for the discharge of primary treated sewage into marine waters if the applicant can demonstrate to the satisfaction of the EPA Administrator that the discharge will comply with all

statutory and regulatory criteria. The criteria are necessarily strict to protect not just humans buy the myriad of life in and on the water.

The original application for a waiver of secondary treatment requirements for the MRWTP was submitted in 1979 during the planning stages for the new regional plant. The original application for a water quality certificate was denied by the Environmental Quality Board (EQB) of Puerto Rico in 1983, followed by the tentative denial of the waiver application by the EPA in 1984. A revised application based on an improved discharge involving screening, grit removal, primary sedimentation and chlorination was submitted by PRASA in 1985. The EPA denied tentatively this second round application in 1986, citing noncompliance with the Commonwealth's mixing zone standards, and failure to demonstrate that the discharge would not affect coral reefs in the area nor interfere with the protection and propagation of a balanced indigenous population of marine life. PRASA then conducted additional water-quality sampling of the existing raw sewage discharge, a flow-through bioassay, detailed surveys of coral communities, and revised flow estimates and diffuser design. The data was submitted in 1987. The EPA issued their final NPDES permit for Mayagüez plant in September 1987, specifying secondary treatment levels for the discharge. In order to comply with the BOD load limitations for secondary treatment, the discharge of the primary treatment plant, and its inherently lower BOD removal rates, is limited to approximately 9 million gallons per day (Mgal/d). The plant began discharging primary-treated wastewater through the outfall at the end of 1987.

Description of the Problem

The marine communities in the Bahía de Añasco, and in the Caribbean in general, have been vulnerable to regional impacts of undetermined cause over the past decades, previous to the existence of the Mayagüez plant. Over the last decade, both a massive sea urchin die-off (Vicente and Goenaga, 1984) and wide-spread coral bleaching (Williams and others, 1987) have been documented in the western Atlantic. Previously healthy colonies of the elkhorn coral *Acropora palmata* have disappeared from the reefs in the Bahía de Añasco during the last 20 years (Morelock and others, 1983). The reefs in the Bahía de Añasco are vulnerable to the sediments and contaminants discharged by the Río Grande de Añasco and the Río Yagüez, sediments and contaminants discharged by the outfall, sediments resuspended during storm events, and are susceptible to changes in water quality. The most damaging factors for coral reefs are nutrients, particulate organic matter, and siltation resulting in changes in habitat (Banner, 1974; Johannes, 1975; Kinsey and Davies, 1979; Pastorok and Bilyard, 1985; Marszalek, 1987). However, the degree of impact is not linear. The growth rates of certain coral species benefit from increased nutrients and particulate organic matter up to a certain level (Tomascik and Sander, 1985). Site specific data is essential to determine the degree of potential impact of a sewage discharge on the surrounding community. This study provides the first observations of effluent quality and conditions in the bay since the regional facility came on line.

Purpose and scope

The U.S. Geological Survey (USGS) in cooperation with PRASA conducted a short-term assessment of environmental conditions in the vicinity of the ocean outfall. A program was designed to document temporal and spatial changes in the biota, sediments, and water quality existing in the immediate vicinity of the outfall and throughout the Bahía de Añasco. The scope of the program was limited to the following tasks:

- Describe the bottom morphology of the Bahía de Añasco in order to define the precise extent and location of hard bottom capable of supporting coral communites.

- Sample the macrobenthic infauna at 8 sites that were previously surveyed by PRASA (1985), and report on their present species abundance and diversity.

- Survey fish and coral communities at 2 previously reported sites, MSG-1 and MSG-2, at 1 new station near the outfall, and at 1 control station located away from the influence of the rivers and the outfall. Report on the species abundance and diversity.

- Core heads of the star coral *Montastrea annularis* at a site located near the outfall and at a control site located away from the influence of the rivers and the outfall. Identify and process samples from parts of the aragonitic skeleton grown over the last 7 years. Report

on the observed growth rates, trace metal content, and stable isotopes of carbon and oxygen.

- Sample surface sediments near the outfall and throughout the bay. Core sediments near the outfall, in the deltas of the Río Grande de Añasco and the Río Yagüez and in a sand channel located in the coral reefs. Report on grain size, total organic material, trace metals, mineralogy, percent carbonate, and accumulation rates.

- Sample the influent, effluent, rivers, and receiving waters and analyze for the full array of priority pollutants, total metals, general inorganics, radionucliides, and non-conservative properties. Report the findings.

- Conduct acute and chronic bioassays using whole effluent and report the results. The bioassays can be used to determine mixing zone dilution requirements. That task is not included in this report.

- Using observed changes in the sediments and biological communities in the Bahía de Añasco discuss if any recent changes can be logically attributed to the outfall.

SUMMARY

The Mayagüez Regional Wastewater Treatment Plant is discharging primary treated effluent into the Bahía de Añasco. The oceanographic conditions appear to favor good mixing in unstratified waters. The populations of

macrobenthic infauna living in the soft-bottom around the outfall are balanced and diverse though much less in number than previous surveys. This probably reflects on the different samplers used. The coral and fish communities reflect the different areas of each site. Though all were at similar depths, the El Negro site was typical of a forereef community with lots of soft corals and few fish, the site near the outfall appeared to be a lagoonal reef community before being stressed by sediments and nutrients in past years. The outfall is not implicated in this degradation, as seen in that the corals growing near the outfall were stressed in 1987 and have since recovered while the outfall has been operational. Sediment deposition patterns continue to reflect the dominance of the Río Grande de Añasco in determining the future environment and biota for the Bahía de Añasco. Water quality sampling verify that the outfall is effectively dispersing contaminants in the effluent within the prescribed mixing zone.

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APPENDIX E

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ENVIRONMENTAL APPEALS BOARD

IN THE MATTER OF:	:	Docket No. EPA-CWA-II-91-41
Mayaguez Regional Sewage Treatment Plant Puerto Rico Aqueduct and Sewer Authority P.O. Box 7066 Barrio Obrero Station Santurce, Puerto Rico 00916	:	Permit Modification Pursuant to Section 301(h) of the Clean Water Act
NPDES Permit No. PR0023795	:	

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II. ISSUES PRESENTED FOR REVIEW RELATING TO THE DENIAL OF THE REQUEST FOR AN EVIDENTIARY HEARING

A. The Determination of EPA-Region II that No Material Issues of Fact Were Raised by PRASA in Its Request for an Evidentiary Hearing with Respect to Section 301(h)(2) is Clearly Erroneous

The Regional Administrator for Region II has denied PRASA's request for an evidentiary hearing concerning PRASA's section 301(h) waiver application because PRASA, allegedly, failed "... to raise material issues of act with regard to sub-section 301(h)(2) ...", and thus the Regional Administrator is required to deny the hearing request "on all issues."[4/] PRASA submits that it did raise material issues of fact[5/] regarding subsection 301(h)(2), and thus the hearing request should have been granted. The conclusion of EPA-Region II that material issues of fact concerning subsection 301(h)(2) were not raised by PRASA in its hearing request is clearly erroneous.

PRASA stated in its request for an evidentiary hearing that the information submitted with its 301(h) waiver application demonstrates that the proposed discharge[6/] of the plant will not interfere with the protection and propagation of a balanced indigenous population of marine life, including coral communities at Manchas Exteriores

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[4/] Letter from Constantine Sidamon-Eristoff to Maria Margarita Irizarry (July 23, 1992) (final decision on PRASA's request for an evidentiary hearing) at 9. Hereinafter this document will be referred to as "Final Decision on Hearing Request."

[5/] PRASA agrees with EPA-Region II that the proper legal standard for determining if an evidentiary hearing should be granted is whether the requester has raised a material issue of fact respecting the intial decision of the Regional Administrator.

[6/] At the time of the submission of the application and all supplemental information, the Mayaguez RWWTP was in the planning, design and construction phases. It did not begin operations until after the closure of the last public comment period.

and Manchas Interiores.[7/] Section 301(h)(2) of the CWA states EPA may modify the requirements of section 301(b)(1)(B) of the CWA if the applicant demonstrates, *inter alia*, that the discharge of pollutants which receive only primary treatment "will not interfere, alone or in combination with pollutants from other sources, with the containment or maintenance of that water quality which assures protection of public water supplies and the protection and propagration of a balanced, indigenous population of shellfish, fish, and wildlife, and allows recreational activities, in and on the water ...." PRASA relied upon studies which were conducted of the marine environment at and in the vicinity of the proposed location of the diffuser/outfall, and submitted on behalf of PRASA during the 1987 public comment period for this assertion.

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Based on the studies done for PRASA and the conclusions and findings set forth therein, PRASA stated in its Request for a Evidentiary Hearing that the discharge at the Mayaguez RWWTP "will not interfere with the protection and propagation of a balanced, indigenous population of marine life including the coral reefs at Manchas Exteriores and Manchas Interiores."[10/] Moreover, based on the studies, PRASA stated in its request that the discharge at the Mayaguez RWWTP would

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[7/] PRASA's Request For an Evidentiary Hearing Submitted in In the Matter Mayaguez Regional Sewage Treatment Plant, Docket No. EPA-CWA-II-91-41, at 7 ¶ 16. Hereinafter referred to as "Evidentiary Hearing Request."

[10/] Evidentiary Hearing Request ¶ 16.

not contribute to, increase or perpetuate the conditions observed in the bay, contribute to further degradation of the marine biota, or retard the recovery of the marine biota if the level of human perturbation from sources of sediment in the watershed decreases.[11/] PRASA relied not only on the studies submitted by it in 1987 but also on the February 1992 Report by the U.S. Geologic Survey, which it appended to its request for an evidentiary hearing for its assertions.[12/] The February 1992 Report assesses the impact of the actual operation of the plant on the surrounding marine environment.

Section 125.61 of Title 40 of the Code of Federal Regulations describes how an applicant demonstrates that its discharge assures the propagation and protection of a balanced, indigenous population of biota. The proposed discharge must allow for the attainment or maintenance of that water quality which assures protection and propagation of a balanced indigenous population of biota.[13/] A balanced, indigenous population of biota must exist immediately beyond the zone of initial dilution of the discharge and in all areas beyond the zone of initial dilution where marine life is actually or potentially affected

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[11/] *Id.* at ¶ 19.

[12/] R. Webb, P. Collar, W. Schwab and C. Goenaga, Assessment of the Biota, Sediments, and Water Quality Near the Discharge of Primary Treated Effluent from the Mayaguez Regional Wastewater Treatment Plant: Bahia de Añasco, Puerto Rico, December 1990 - January 1991 (1992). Hereinafter referred to as the "February 1992 Report."

[13/] 40 C.F.R. § 125.61(c)(1).

by the proposed discharge.[14/] If either of the conditions described above does not exist due to conditions resulting from human perturbations other than the proposed discharge, the applicant must demonstrate that its proposed discharge will not:

1) contribute to, increase or perpetuate existing conditions;

2) contribute to further degradation if the level of human perturbation from other sources increases; and

3) retard the recovery of the biota or water quality if the level of human perturbation from other sources decreases.[15/]

EPA-Region II denied the request for an evidentiary hearing on the ground that PRASA had failed to raise a material fact with respect to the requirement of section 301(h)(2) of the CWA.[16/] Specifically, EPA-Region II concluded that PRASA's 1987 submittal stated that the coral communities are stressed due to natural conditions and not human disturbances.[17/] This finding is clearly

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[14/] 40 C.F.R. § 125.61(c)(2).

[15/] 40 C.F.R. § 125.61(f).

[16/] Final Decision on Hearing Request at 9.

[17/] *Id.* at 5. EPA-Region II acknowledges on page 8 that PRASA's submission supports the conclusion that human and natural disturbances are stressing the corals.

erroneous. PRASA's submission states that the coral communities are stressed due primarily to the heavy sediment loading from the Rio de Añasco which results from natural events and extensive agriculture in the watershed.[18/]

EPA then concludes that the 1987 submittal does not address the demonstration required by 40 C.F.R. § 125.6(f).[19/] This conclusion is clearly erroneous. The 1987 submittal contained data concerning sediment loading and nutrient loading from the Rio de Añasco watershed and the proposed discharge.[20/] The 1987 submittal included an analysis of that data, and includes data on other factors which might effect water quality such as ph and dissolved oxygen.[21/] Finally, the submittal sets forth conclusions concerning the impact of the proposed discharge on the marine biota given the existing conditions, and the likely impact of the proposed discharge if the human disturbances were increased or decreased in any significant way.[22/]

[18/] April 1977 Report at 4-16 and 4-24.

[19/] 40 C.F.R. § 125.61(c)(1).

[20/] See for example April 1977 Report at Chapter 6.

[21/] *Id.* Chapter 6.

[22/] *Id.* Chapters 4 and 6.

EPA-Region II also concluded, erroneously, that the 1992 Report[23] which was appended to PRASA's Request for an Evidentiary Hearing, failed to support PRASA's statement in its hearing request that the actual discharge of the plant will not impact the coral communities.[24] The conclusion of EPA-Region II is clearly erroneous. EPA has relied on selective quoting of conclusions in the report.[25] EPA relied upon a quote from Appendix 3 of the report. The full quote is:

> In conclusion, coral cover, gorgonian density and other parameters were lower in the stations closest to the outfall; therefore, the hypothesis that there is an effect by the sewage outfall on the coral reef benthic environment is supported or, at least, it is not invalidated. The available evidence, however, does not prove the hypothesis of damage by the outfall either, mainly because of the presence of other pollution sources. Further detailed work with additional stations is needed to assess the hypothesis of damage by the outfall.[26]

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[23] See p. 14 *infra* for a discussion of the legal status of this study. On the one hand EPA-Region II has relied upon the study in deciding whether to grant the request for hearing; however, elsewhere in its decision on the hearing request it takes the position that the study is not part of the administrative record and need not be considered by the Agency.

[24] Final Decision on Hearing Request at 8-9.

[25] Final Decision on Hearing Request at 8.

[26] February 1992 Report, Appendix 3, p. 11.

Moreover, EPA-Region II conveniently ignored the following:

> Coral abundance and diversity were greatest at site MSG-2, and lowest near the outfall. Comparing the species observed at stations MSG-1 and MSG-2 with the 1985 study [submitted by PRASA on] no significant difference in hard coral cover was documented. The station nearest the outfall, MO-5, is obviously degraded.... Diver transects reported in [PRASA 1987 submittal] before the outfall was installed, documented that patch and fringing reefs near the shore are dead, while those offshore on the eastern side of the reefs are degraded, and those in the middle and western sides of Manchas Interiores are in relatively good health. No changes in this general pattern was observed in this study.[27/]

Finally, EPA-Region II's conclusion is clearly erroneous because it is totally inconsistent with other findings and statements in the Report including the results of the coral borings conducted as part of the February 1992 Report. Four coral acres were taken which showed that a significant stress event had occurred in the 1987-1988 timeframe which stunted the growth of the corals.[28/] The data is consistent with a bleaching event that was

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[27/] February 1992 Report at 27. Station MO-5 is located on the eastern side of the reefs. See Figures 3 & 8 of the February Report.

[28/] February 1992 Report at 30. Two of the cores were taken from a control site and two were taken from a location 610 meters from the outfall.

experienced throughout the Caribbean in 1987-1988.[29/] The x-radiographs of the cores demonstrates the corals had recovered from the stress event, and were growing at rates equal to or greater than they were before the event.[30/] Thus the plant's discharge did not impede the recovery of the reefs.[31/]

In summary, the bases articulated by EPA-Region II for its conclusion that PRASA had failed to raise material issues of fact with respect to compliance with section 301(h)(2) are clearly erroneous. PRASA has raised material issues of fact. Accordingly, the decision of EPA-Region II to deny PRASA's request for an evidentiary hearing should be reversed, and this Board should remand this matter to EPA-Region II for an evidentiary hearing on all of the issues raised in PRASA's request for an evidentiary hearing.

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[29/] *Id.*

[30/] *Id.*

[31/] *Id.*

APPENDIX F

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ENVIRONMENTAL APPEALS BOARD

IN THE MATTER OF:	Docket No. EPA-CWA-II-91-41
Mayaguez Regional Sewage Treatment Plant Puerto Rico Aqueduct and Sewer Authority P.O. Box 7066 Barrio Obrero Station Santurce, PR 00916	PRASA's Supplemental Petition For Review and Reply Memorandum Relating To Permit Modification Pursuant to Section 301(h) of the Clean Water Act
NPDES Permit No. PR0023795	

* * * *

H. PRASA Has Demonstrated That the Plant's Discharge Will Not Interfere, Alone or in Combination With Pollutants From Other Sources, With the Attainment or Maintenance of That Water Quality Which Assures the Protection and Propagation of a Balanced, Indigenous Population of Shellfish, Fish, and Wildlife

Region II denied PRASA's request for an evidentiary hearing because PRASA failed allegedly to raise material

issues of fact with regard to section 301(h)(2).[166/] Region II also denied the waiver application on the ground that PRASA failed to present sufficient and adequate data to demonstrate that the proposed discharge will not interfere with the protection and propagation of a balanced indigenous population of marine life, specifically the coral reefs at Manchas Exteriores and Manchas Interiores.[167/] For the reasons set forth at pages 4-14 of PRASA's Petition for Review Relating to Permit Modification Pursuant to Section 301(h) of the Clean Water Act, and which are incorporated herein by reference, Region II is wrong and this Board should reverse Region II's ruling, or in the alternative remand the issue of whether PRASA has demonstrated compliance with section 301(h)(2) to Region II for an evidentiary hearing.

In its Response Region II fails to address the arguments raised by PRASA in its petition for review by this Board. Instead Region II rests its case on the argument that PRASA has failed in its 1987 Submission to demonstrate that its proposed discharge will not contribute to the existing stressed condition in the coral communities because PRASA estimated, using conservative assumptions, that the plant's discharge would contribute approximately 1% of the total sediment loading into the Bahia Añasco.[168/] Region II's reasoning is straightforward, albeit wrong. According to Region II, there is a quantifiable loading of sediment, therefore, there

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[166/] Region II Response Exhibit 2 at 9.

[167/] December 13, 1991 Letter at 2.

[168/] Response at 9-10.

is an impact. PRASA and Region II's consultant, Tetra Tech, arrived at precisely the opposite conclusion.[169/] There are no facts in the record upon which Region II could reasonably conclude that an approximately 1% loading of sediment would contribute to the stressed conditions caused by the tremendous sediment loading from the river.[170/] The data in the 1987 Submission leads one ineluctably[sic] to the conclusion that a 1% loading would not contribute to the existing conditions. The data in the February 1992 Submission confirms PRASA's conclusion. Accordingly, Region II's argument should be rejected.

[169/] Tetra Tech August 1990 Report at 23-24. Tetra Tech suggests that the calculated concentration of 0.6 uM phosphate may result in a nutrient concentration that may contribute to a reduction in growth of the coral. *Id.* at 25. Tetra Tech notes, however, that any such impact will be mitigated by the sedimentation of Rio Anasco because high turbidity and lower light conditions limit nutrient utilization. *Id.* This conclusion is consistent with the 1976 study by the U.S. Department of Agriculture which concluded that there is an annual deposition of 65,000 tons of sediment into the Bahia de Añasco. *See* 1987 Submission at 4-16.

[170/] Region II attempts to discredit PRASA's estimation of sediment loading as a result of the plant's discharge by noting that the plant's current flow is greater than 8 MGD, the flow assumption made by Metcalf & Eddy in its estimate. The plant's flows are not significantly greater than 8 MGD. See pp. 31-34 *supra*. Moreover, in its 1985 submission PRASA estimated sediment loading from the plant's discharge at 7,100 kg/day (assuming annual average flow of 18.6 MGD and a suspended solid concentration of 101 mg/1). At 7,100 kg/day the plant's discharge would only contribute approximately 4% of the total load of sediment. Thus even if the plant flow was 18 MGD, the plant's discharge would not contribute to, increase or perpetuate the existing conditions.

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31. PRASA has demonstrated in its 1987 Submission and its February 1992 Submission that the plant's discharge will not interfere with the attainment or maintenance of that water quality that assures the protection and propagation of a balanced indigenous marine population. PRASA, therefore, has demonstrated compliance with section 301(h)(2).